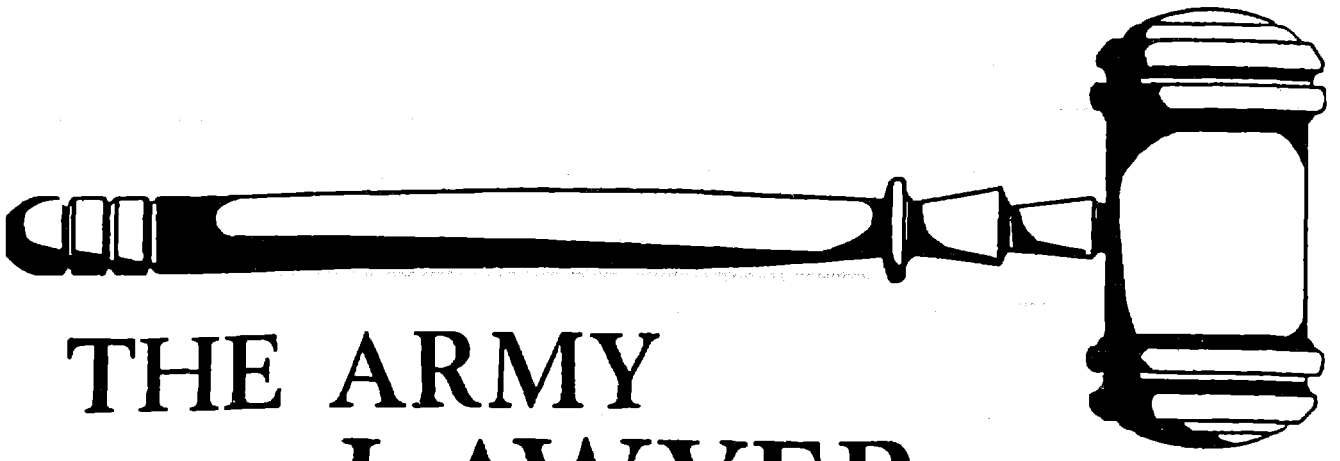

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Editor
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The Changing Face of Sovereign Immunity in Environmental Enforcement Actions

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Introduction

On March 1, 1993, the State of Maryland served the Commanding General, Aberdeen Proving Ground (APG), with a complaint, order, and administrative penalty of $5000 for violations of state laws regarding controlled hazardous substances.[1] The complaint cited twenty-two separate violations of the state hazardous waste code, including violations discovered during inspections that took place in March and September 1992—prior to the adoption of the Federal Facilities Compliance Act (FFCA) on October 6, 1992.[2] Deficiencies also were discovered during inspections that occurred after October 6, 1992. Notably, during a post-wide multimedia inspection by the National Enforcement Investigations Center in January 1993, inspectors found hazardous substances that were stored for more than ninety days in an unpermitted area of one of the installation's tenant units.[3] Although the complaint and order were unclear on what violation prompted the $5000 fine, Maryland officials unequivocally asserted that the fine was for the January 1993 violation. The Commanding General, Aberdeen Proving Ground, did not contest the fine, making APG the first federal installation to pay an environmental fine following adoption of the FFCA.

On March 4, 1993, the APG commander received a draft consent order for the installation's underground storage tank (UST) program and was given until March 12, 1993, to either sign the consent order or face the prospect of the Maryland Department of the Environment (MDE) unilaterally taking action.[4] The MDE's draft consent order also contained stipulated penalties for unexcused failures in meeting agreed upon deadlines.[5] The draft consent order established a rate table that would require APG to pay $250 per day for the first ten days after failing to meet a deadline, $1000 per day for the next fifty days, and $5000 per day thereafter.[6] The Commanding General, Aberdeen Proving Ground, objected to the stipulated penalties, asserting that sovereign immunity had not been waived under the UST program for the payment of fines and penalties. The MDE agreed to withdraw the clause from the agreement.

Aberdeen Proving Ground's experiences illustrate the fluid nature of federal sovereign immunity in environmental enforcement actions. Sovereign immunity recently has undergone dramatic changes because of judicial interpretation and legislative action—a trend that likely will continue. Under the principle of sovereign immunity, only Congress can waive the federal government's immunity to lawsuits. States can regulate the activities of federal agencies only when authorized to do so by Congress, and that authorization must be "clear and unambiguous."[7] Each of the major environmental statutes, however, includes a limited waiver of sovereign immunity for complying with state laws.[8] The waivers of sovereign immunity generally have not given states the power to fine federal installations, although state attorneys general have contended that the waivers do allow states to assess civil penalties against the federal government. The Supreme Court's recent decision in *Department of Energy v. Ohio* reinforces the view that the sovereign immunity waivers do not include civil penalties.[9] In dicta, however, the Court opined that some circumstances could arise under which the Clean Water Act waiver (CWA) might allow for civil penalties as "coercive sanctions."[10]

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[1] Complaint, Order and Administrative Penalty, No. C-0-93-070, issued February 25, 1993, by Maryland Department of the Environment [hereinafter Order].

[2] Federal Facilities Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992).

[3] Order, *supra* note 1.

[4] Transmittal letter from Maryland Department of the Environment, Draft Underground Storage Tank Consent Order, Case No. CO-93-022 Oil, Mar. 3, 1993.

[5] Draft Consent Order, Maryland Department of the Environment, Case No. CO-93-022 Oil. The stipulated penalties clause was only one part of the draft document that concerned APG. The MDE also had moved deadlines forward—in some cases, as many as five years—ahead of any draft that MDE officials themselves had proposed. APG has more than 600 USTs covered by the order to which the parties ultimately agreed on March 15, 1993.

[6] *Id.*

[7] Environmental Protection Agency v. California *ex. rel.* State Water Resources Control Bd., 426 U.S. 200, 211 (1976).

[8] *See* Safe Drinking Water Act, 42 U.S.C. § 300j-6 (1988 & West Supp. 1991); Clean Water Act, 33 U.S.C. § 1323 (1988); Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (1983 & West Supp. 1992); Clean Air Act, 42 U.S.C. § 7418 (1978 & West Supp. 1992); Underground Storage Tanks, 42 U.S.C. § 6991f (1984 & West Supp. 1992).

[9] Department of Energy v. Ohio, 112 S. Ct. 1627, 1638-39 (1992); *see infra* text accompanying notes 26-29.

[10] *Department of Energy v. Ohio,* 112 S. Ct. at 1636-38.

Passage of the FFCA complicated matters further. The FFCA amends the Solid Waste Disposal Act (SWDA)—commonly known as the Resource Conservation and Recovery Act (RCRA)—allowing states to assess civil penalties against federal installations for noncompliance.[11] The FFCA, however, applies only to solid and hazardous waste.[12] The FFCA's waiver of sovereign immunity does not extend to any other environmental statutes—not even to the sovereign immunity waiver regarding underground storage tanks, also which is codified under the SWDA.[13] Congress, however, can be expected to pass similar legislation for other environmental statutes.[14] To gain a full understanding of the extent to which sovereign immunity may act as a defense under particular circumstances, each of the statutory sovereign immunity waivers must be examined in light of recent developments.

Waivers of Sovereign Immunity in General

The premise supporting sovereign immunity originates from the Supremacy Clause and is "exemplified in the Plenary Powers Clause of the Constitution."[15] The principle establishes that states could not regulate federal actions unless Congress constitutionally consented to such regulation. Congress, however, has not always crafted unambiguous waivers of sovereign immunity. Therefore, courts have developed rules of interpretation when waivers of sovereign immunity were claimed based on ambiguous language.[16] The rules of interpretation—summarized in *McClellan Ecological Seepage Situation (MESS) v. Weinberger*—concluded that a waiver would not be recognized unless it was "clear, concise and unequivocal."[17] Furthermore, "if there is any doubt, waiver will not be found. Waiver cannot be implied. It cannot be assumed. It cannot be based on speculation, surmise or conjecture."[18] This premise later was reiterated in the Supreme Court's opinion in *Department of Energy v. Ohio*, in which the Court determined that the Department of Energy could not be fined for past violations of the RCRA or the CWA.[19]

Waivers of Sovereign Immunity in Environmental Statutes

The Supreme Court's 1976 decisions in *Hancock v. Train* and *Environmental Protection Agency v. California* prompted a minor legislative revolution.[20] In each of those cases, the Supreme Court held that state permitting requirements did not apply to federal installations. Congress responded by amending the federal facility provisions of the Clean Air Act (CAA), the CWA, and the Safe Drinking Water Act (SDWA) and passed a more carefully worded sovereign immunity waiver with the RCRA.[21] The waiver language in these environmental statutes, however, is not uniform. As a result, each waiver must be examined separately to fully understand its applications.

The Clean Water Act

Section 313(a) of the CWA requires federal installations to "comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the

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[11] Federal Facilities Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992). The FFCA addresses not only sovereign immunity, but also other military concerns. For example, the FFCA requires the Environmental Protection Agency to promulgate rules governing military munitions disposal within two years. *Id.* § 107.

[12] *Id.*

[13] 42 U.S.C. § 6991f (1984 & West Supp. 1992).

[14] The lead exposure amendments to the Toxic Substance Control Act, enacted three weeks after the FFCA, included a federal facilities provision similar to that of the FFCA. It subjects federal facilities to "all civil and administrative penalties and fines regardless of whether such penalties or fines are punitive or coercive in nature." 15 U.S.C. § 2688 (1983 & West Supp.) In addition, the proposed Federal Facilities Clean Water Compliance Act of 1993 would allow fines against the federal government for Clean Water Act violations. H. R. No. 340, 103d Cong., 1st Sess. (1993).

[15] Lotz, *Federal Facility Provisions of Federal Environmental Statutes: Waiver of Sovereign Immunity for "Requirements" and Fines and Penalties*, 31 AIR FORCE L. REV. 7, 8 (1989) (citing Hancock v. Train, 426 U.S. 167 (1976)); *see* U.S. CONST., art. I, § 8, cl. 17.

[16] *Id.*

[17] *Id; see* McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1187 (E.D. Cal. 1988).

[18] *McClellan Ecological Seepage Situation*, 707 F. Supp. at 1187.

[19] Department of Energy v. Ohio, 112 S. Ct. 1638-40 (1992).

[20] Lotz, *supra* note 15, at 11.

[21] *Id.*

same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges."[22] Following *Hancock* and *Environmental Protection Agency v. California,* Congress added that this waiver "shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever)."[23] The section further waives immunity "to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner."[24] The CWA waiver also provides that the federal government may remove any action against it to federal district court and that no officer or employee of the federal government could be held liable for fines arising from "performance of his official duties."[25] Finally, the "United States shall be liable only for those civil penalties arising under Federal law or imposed by State or local court to enforce an order or the process of such court."[26]

In *Department of Energy v. Ohio*, the Court's decision on the CWA sovereign immunity waiver hinged, among other things, on the interpretation of the term "process and sanctions."[27] The State of Ohio sought penalties for violations of state and federal pollution laws—including the CWA and the RCRA—at the Department of Energy's uranium processing plant in Fernald, Ohio.[28] The state contended that the "federal-facilities" and "citizen-suit" sections in the CWA effectively waived sovereign immunity for fines. Ohio argued that the word "sanction" in the CWA federal facilities section was intended to encompass punitive fines.[29] The Supreme Court, however, held that any waiver of sovereign immunity must be clear and unequivocal and—with regard to punitive fines—the CWA sovereign immunity waiver failed to meet that test.[30]

The Court also opined that states could impose civil penalties if assessed as "coercive sanctions."[31] Justice Souter wrote that the language in the CWA waiver that federal facilities "shall be subject to . . . all Federal, State and local . . . sanctions" indicates that Congress intended to allow civil penalties when used as a coercive tool in instruments such as orders or judgments.[32] Justice Souter also found support for this interpretation in the language that the "United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court."[33] The *Department of Energy v. Ohio* dictum implies that, under the CWA waiver, local courts might be able to issue compliance orders followed by contempt citations for violations, and possibly even stipulated penalties. The latter passage is unique to the CWA. Therefore, a state seeking "coercive sanctions" pursuant to any other environmental statute, would be less likely to succeed.

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[22] 33 U.S.C. § 1323(a) (1986). The section reads as follows:

> (a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, of employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 et seq. of Title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court. . . .

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Department of Energy v. Ohio, 112 S. Ct. 1636-37 (1992).

[28] *Id.* at 1631-32.

[29] *Id.* at 1636.

[30] *Id.* at 1633.

[31] *Id.* at 1636-38.

[32] *Id.* at 1637.

[33] *Id.* at 1637-38.

The Resource Conservation and Recovery Act

The FFCA has altered the extent of the sovereign immunity waiver under RCRA significantly.[34] *Department of Energy v. Ohio* temporarily clarified that civil penalties were not obtainable under the RCRA.[35] The period of comfort for federal attorneys, however, was shortlived, terminating when the FFCA became law on October 6, 1992. Under the FFCA, state regulators clearly can assess fines against federal installations for violating solid and hazardous waste laws.[36] Consequently, when APG was assessed a fine for a ninety-day storage violation, the installation had to pay. The decision of whether to contest the fine rested on a determination of whether the fine was reasonable in light of the violation. Maryland's environmental code provides for penalties of up to $25,000 per day, per violation.[37] Because the violation was more than just a bookkeeping error, the Commanding General, APG, determined that the $5000 fine was reasonable.

With the addition of the FFCA, Congress rendered obsolete any case law holding that the RCRA waiver of sovereign immunity was not "clear and unequivocal." As with the CWA, section 6001 of the RCRA requires the federal government to comply with federal, state, and local solid and hazardous waste requirements "both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief)," that include "reasonable service charges."[38] The FFCA, however, adds that such requirements "include, but are not limited to, all adminis-

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[34] 42 U.S.C. § 6961 (1983 & West Supp. 1992). The sovereign immunity waiver is set forth in its entirety as follows:

> (a) In General—Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local solid or hazardous waste law with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any sanction.

[35] Department of Energy v. Ohio, 112 S. Ct. 1639-40 (1992).

[36] Federal Facilities Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992).

[37] MD. ENV. CODE ANN. § 7-266 (1987 and Cum. Supp. 1992). In determining the appropriate penalty, the following factors are to be examined:

> 1. The willfulness of the violation, the extent to which the existence of the violation was known to but uncorrected by the violator, and the extent to which the violator exercised reasonable care;
>
> 2. Any actual harm to the environment or to human health, including injury to or impairment of the use of the waters of this State or the natural resources of this State;
>
> 3. The cost of cleanup and the cost of restoration of natural resources;
>
> 4. The nature and degree of injury to or interference with the general welfare, health, and property;
>
> 5. The extent to which the location of the violation, including location near waters of this State or areas of human population, creates the potential for harm to the environment or to human health or safety;
>
> 6. The available technology and economic reasonableness of controlling, reducing, or eliminating the violation;
>
> 7. The degree of hazard posed by the particular waste material or materials involved; and
>
> 8. The extent to which the current violation is part of a recurrent pattern of the same or similar type of violation committed by the violator.

Id.

[38] 42 U.S.C. § 6961(a) (1983 & West Supp. 1992).

trative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations."[39] The FFCA further asserts that the federal government "waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement."[40] The FFCA also clarifies the meaning of "reasonable service charge" to include charges in connection with processing necessary paperwork "as well as any other nondiscriminatory charges that are assessed in connection with a . . . solid or hazardous waste regulatory program."[41] The FFCA also created a second subsection that empowers the Environmental Protection Agency to initiate administrative actions against federal facilities.[42] While the FFCA states that the federal government would be liable for RCRA violations "for isolated, intermittent, or continuing violations," federal installations still have a defense against actions for past violations. President Bush—in his adoption press release—stated his belief that the FFCA was ratified "notwithstanding the holding of the Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation.*"[43] In *Gwaltney,* the Court held that the Chesapeake Bay Foundation could not compel the meat-packer defendant to pay civil penalties for wholly past permit violations.[44]

Additionally, the FFCA, by its own language, only applies to solid and hazardous waste regulation. It does not apply to any other environmental laws. In particular, it does not apply to subtitle IX of the SWDA, which governs underground storage tanks.[45] In addition, it applies only to environmental laws aimed at regulating solid and hazardous wastes. For example, the federal immunity principle traditionally has included exemption from local building codes and zoning ordinances.[46] Therefore, if a local government attempts to limit a federal facility's solid waste activities—such as landfills—through zoning restrictions, sovereign immunity would be a defense despite the FFCA.

The Clean Air Act

As with the CWA, the federal government under section 118 of the CAA is required to comply with "all Federal, State, interstate and local requirements, administrative authority, and process and sanctions" regarding air pollution "in the same manner, and to the same extent, as any nongovernmental entity."[47] As with the CWA and the RCRA, the waiver applies for "substantive or procedural" requirements, including obtaining permits.[48] The CAA further waives the sovereign immunity defense for the payment of regulatory fees and "to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner."[49]

Despite the waiver of immunity against payment of regulatory fees, the federal government, when faced with sanctions

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] President Bush Press Release accompanying the signing of the FFCA (Oct. 6, 1992).

[44] Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987). For a discussion of the case, see *Will Jurisdiction Attach in Citizen Suits Against Wholly Past Permit Violators Under Section 505 of the Clean Water Act?*, XXIV LAND & WATER L. REV. 153 (1989).

[45] 42 U.S.C. § 6991a-i (1983 & West Supp. 1992). For discussion of the UST waiver see *infra* text accompanying notes 55-60.

[46] United States v. Chester, 144 F.2d 415 (3d Cir. 1944); United States v. Philadelphia, 56 F. Supp. 862 (E.D. Pa. 1944), *aff'd,* 147 F.2d 291 (3d Cir.), *cert. denied,* 325 U.S. 870 (1945).

[47] 42 U.S.C. § 7418 (1978 & West Supp. 1992). The full text of the CAA sovereign immunity waiver is as follows:

> (a) General compliance
>
> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.

[48] *Id.*

[49] *Id.*

for violating the CAA, still may contest fees that are discriminatory, are excessive, or constitute improper taxes and fees imposed by local regulators in violation of due process.[50]

The Safe Drinking Water Act

Section 1447 of the SDWA subjects the federal government to "all Federal, State and local requirements, administrative authorities and process and sanctions respecting the provision of safe drinking water and respecting any underground injection program."[51] As with the preceding federal facilities sections, the SDWA sovereign immunity waiver specifically applies to any "recordkeeping or reporting requirement, any requirement respecting permits, and any other requirement whatsoever."[52] The operative language of the SDWA federal facilities section is substantially similar to that of the other environmental federal facilities sections.

Instead of using the phrase "process and sanction"—as in the CWA and other sovereign immunity waivers—Congress adopted the phrase "process *or* sanction" the second time it was used in the SDWA waiver.[53] Arguably, Congress's choice of words might be significant if a state attorney general were to seek civil penalties against the federal government under authority of the SDWA. The meanings of "process and sanction" and "process or sanction" are slightly different. In *Department of Energy v. Ohio*, Justice Souter attached some significance to the context of the word "sanction" in the CWA federal facilities section.[54] "Sanction," as juxtaposed in the CWA waiver, clearly is dependent on the "process." In other words, a process must be initiated prior to imposing a sanction. Under the SDWA, however, *either* a process *or* a sanction can result. Under the SDWA, an ongoing judicial "process" arguably is not a prerequisite for a state to impose sanctions on a federal facility.

The SDWA federal facilities section, however, does not constitute an unambiguous waiver of sovereign immunity for punitive fines. While the "process or sanction" language may concern a federal government defendant, because the SDWA lacks the civil penalties language of the CWA, these cases are easier to defend. In *Department of Energy v. Ohio,* the federal government had to contend with language stating that the United States would be liable for certain "civil penalties."[55] The SDWA does not contain similar language. If Congress had intended to subject unambiguously the federal government to punitive fines under the SDWA, it could have, but chose not to.

Underground Storage Tanks

While the solid waste amendment governing underground storage tanks ordinarily is not considered a major environmental statute, its import for federal installations makes it a major statute for the federal environmental lawyer. Section 9007 of the SWDA is comparable to other sovereign immunity waivers in substance and scope.[56] It differs, however, in several important respects that may prove crucial when dealing with state and local regulators.

As with the other federal facilities sections, Congress has waived sovereign immunity against "all Federal, State, interstate, and local requirements" applicable to USTs.[57] Section

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[50] United States v. Couth Coast Air Quality Management Dist., 748 F. Supp. 732 (C.D. Cal. 1990). For the test to determine whether a charge is a "fee" or a "tax," see Massachusetts v. United States, 435 U.S. 444, 467-70 (1978).

[51] 42 U.S.C. § 300j-6 (1988 and West Supp. 1991). The text of the waiver is as follows:

> Each Federal agency (1) having jurisdiction over any federally owned or maintained public water system or (2) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water (within the meaning of section 300h(d)(2) of this title) shall be subject to, and comply with, all Federal, State, and local requirements, administrative authorities, and process and sanctions respecting the provision of safe drinking water and respecting any underground injection program in the same manner, and to the same extent, as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits, and any other requirement whatsoever), (B) to the exercise of any Federal, State or local administrative authority, and (C) to any process or sanction, whether enforced in Federal, State or local courts or in any other manner. This subsection shall apply, notwithstanding any immunity of such agencies, under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty under this subchapter with respect to any act or omission within the scope of his official duties.

[52] *Id.*

[53] *Id.* (emphasis added).

[54] Department of Energy v. Ohio, 112 S. Ct. 1637 (1992).

[55] *Id.*

[56] 42 U.S.C. § 6991f(a) (1983 & West Supp. 1992). The sovereign immunity waiver reads as follows:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any underground storage tank shall be subject to and comply with all Federal, State,interstate, and local requirements, applicable to such tank, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.

[57] *Id.*

9007, however, does not waive sovereign immunity explicitly against "process and sanction," as do the other environmental sovereign immunity waivers.[58] The only time any form of the phrase "process or sanction" is mentioned in the waiver is in regard to "injunctive relief."[59] Therefore, while a stipulated penalty apparently would be allowed pursuant to an order for UST compliance, this actually is not the case. Justice Souter's dicta in *Department of Energy v. Ohio*—indicating that states could impose civil penalties under the CWA if imposed as "coercive sanctions"—cannot be construed to allow stipulated penalties. Justice Souter's discussion focused on the use of the word "sanction" in the CWA waiver.[60] Accordingly, based on *Department of Energy v. Ohio*, a state cannot make a credible argument for stipulated penalties regarding USTs. Consequently, when APG objected to the inclusion of stipulated penalties in the proposed draft consent order for the installation's UST program, the clause was withdrawn.

The absence of the "process and sanction" language in the UST sovereign immunity waiver represents sound public policy. The UST amendment regulates USTs that may have been placed in the ground many years ago. As with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund),[61] the UST statute addresses and attempts to correct already-existing conditions, rather than being a prospective compliance program as the other statutes are. For the federal government to allow itself to be fined for past mistakes—many of which occurred prior to passage of the UST amendment in 1986—would not be good policy.

Comprehensive Environmental Response, Compensation and Liability Act

Because CERCLA is not a compliance statute in the nature of the CWA, the CAA, and the RCRA, the federal facilities section of CERCLA operates substantially differently than the other environmental statues.[62] Pursuant to CERCLA section 120, federal facilities are liable for hazardous waste cleanup costs for which they are responsible.[63] While the federal government may be sued as a party that partially is responsible for the release of hazardous substances, no provision for punitive fines exists. Stipulated penalties, however, arguably could be included in a consent decree that would set remediation milestones.[64] Under the CERCLA's enforcement section, stipulated penalties of up to $25,000 per day may be included in a consent decree.[65] Whether Congress has waived sovereign immunity clearly for such penalties remains open to debate.

Conclusion

The enforcement actions at APG illustrate how varied the waivers of sovereign immunity are among the different environmental statutes. Each statute is somewhat different from the others and may be interpreted differently. Congress could have adopted identical language for each statute but apparently chose not to do so. Consequently, even slight variations of language can subject the sections to sharply contrasting interpretations.

Courts long have held Congress to an exacting standard in statutory interpretation on the assumption that Congress drafts legislation with specific intentions. Only Congress has the authority to overcome the presumption that the federal government is immune from lawsuits brought against it. Congress has adopted federal facilities sections in conjunction with each of the major environmental compliance laws. Congress, however, generally has not given the states authority to impose punitive fines for environmental violations at federal installations. The FFCA may be Congress's first step toward subjecting federal installations more broadly to state and local enforcement actions. Federal environmental law practitioners must be aware that the laws regarding federal sovereign immunity are changing constantly. Nevertheless, with regard to each of the federal facilities sections—except for Section 6001 of the RCRA—no clear and unambiguous waiver of sovereign immunity exists that would allow the federal government to pay fines. No matter what happens regarding the waivers of sovereign immunity in these statutes, however, the best defense to environmental enforcement actions always will be prudent environmental management.

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[58] *Id.*

[59] *Id.*

[60] Department of Energy v. Ohio, 112 S. Ct. 1636-38 (1992).

[61] *See* 42 U.S.C. §§ 9601-75 (1983 & West Supp. 1992).

[62] *Id.* § 9620(a)(1). The text is as follows:

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 or 9607 of this title.

[63] *Id.*

[64] *Id.* § 9621.

[65] *Id.* § 9621(e)(2).

Use of Performance-Based Standards in Contracting for Services

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Introduction

A pending revision to the *Federal Acquisition Regulation* (*FAR*) has focused new attention on the requirement that government agencies generally use functional or performance specifications to define the work that they employ contractors to perform.[1] Typically, this policy has been interpreted as a preference for functional or performance specifications over design specifications in the acquisition of supplies. In April 1991, however, the Office of Federal Procurement Policy (OFPP) issued Policy Letter 91-2,[2] which announced "the policy of the Federal Government that . . . agencies use performance-based contracting methods to the maximum extent practicable when acquiring services."[3] Construction and architect-engineering services—acquired in accordance with the Brooks Act—are exempt from this policy; in general, however, a government agency that fails to use performance-based standards in service contracting specifically must justify its action and maintain documentation in the affected contract files.[4]

Proposed implementing *FAR* revisions were published in July 1992.[5] They include a restatement of the policy as articulated in the policy letter,[6] and they assign to the contracting officer responsibility for implementing this policy or documenting the justification for any exception.[7] The specific actions required to implement the policy are set forth in a new "Subpart 37.2—Performance-Based Contracting."

The emerging policy has important implications for government agencies that contract for services. At a minimum, performance-based contracting implies that the contract will define the "work" to be performed by the contractor in terms of the *result* that the contractor's effort is expected to produce—rather than the level of effort exerted by the contractor[8]—so that the contractor's performance can be measured against a definable standard. This new focus on "product," rather than "process," will require reorientation of both government and contractor personnel. It also will require more rigorous attention to writing statements of work because of the need for greater precision and specificity in defining the "work" to be accomplished. Further, the statement of work is to be accompanied by a quality assurance (QA) surveillance plan[9] that includes measurable inspection and acceptance criteria corresponding to the performance standards in the statement of work.[10]

This article will discuss the emerging policy and its pending implementation, placing it in the context of a broader movement toward increased accountability. It also will offer suggestions for government agencies to pool resources, learn from each other's experiences, and implement this important policy as painlessly and effectively as possible.

Background

The Armed Services Procurement Act[11] authorizes the use of specifications expressed in terms of "(i) function, so that a variety of products or services may qualify; (ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or (iii) design

[1] The policy is set forth in GENERAL SERVS. ADMIN ET. AL., FEDERAL ACQUISITION REG. 10.002(b) (1 Apr. 1984) [hereinafter FAR] (acquisition policies and procedures shall require descriptions of agency requirements, whenever practicable, to be stated in terms of functions to be performed or performance required).

[2] Policy Letter 91-2, 56 Fed. Reg. 15,112 (Office of Fed. Procurement Policy 1991).

[3] *Id.* ¶ 5.

[4] The justification and documentation requirement appears in the policy letter at ¶ 5. *Id.* The architect-engineering services and construction exemption from the policy appears at ¶ 3.b. of the policy letter, which excludes those activities from the definition of "services." *Id.* ¶ 3.b.

[5] 57 Fed. Reg. 33,702 (1992) (effective July 30, 1992).

[6] Proposed FAR 37.102(b).

[7] Proposed FAR 37.103(a), 37.203.

[8] Proposed FAR 37.201(a).

[9] Proposed FAR 37.202-2.

[10] *Id.*

[11] 10 U.S.C. § 2301 (1988).

requirements."[12] It also announces as "Congressional defense procurement policy"[13] that procurement actions of the Department of Defense (DOD), National Aeronautics and Space Agency, and the Coast Guard are to require "descriptions of agency requirements, whenever practicable, in terms of functions to be performed or performance required."[14]

The civilian agencies of the executive branch also are authorized to use all three types of specifications.[15] The preference for performance-based specifications in their procurement activities is stated in the congressional declaration of policy to "promote economy, efficiency and effectiveness in the procurement of property and services by the executive branch [by] promoting, whenever feasible, the use of specifications which describe needs in terms of functions to be performed or the performance required."[16]

The more recent policy statement, a 1988 amendment to the Armed Services Procurement Act,[17] represents an expectation that using performance specifications instead of detail specifications (design requirements) would save the government both time and money by freeing contractors to exercise initiative and creativity in meeting the government's needs and by reducing the number of acquisition personnel employed by the DOD.[18] Therefore, the expectation and intent underlying the preference for performance-based specifications were that *increasing* the use of performance-based specifications—and *decreasing* the use of design specifications—would *reduce* the government's control of the contractor's activity.

The OFPP's Policy Letter 91-2 indicates a similar approach. Its stated reason for using performance-based standards is to ensure that an acquisition is structured around "the purpose of the work to be performed, as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work."[19] The expressed intent, therefore, is to *decrease* the use of detail specifications (that prescribe "the manner by which" the work is to be done) and thereby to *decrease* government control over the contractor's activities in performing the contract. Consequently, the two policies apparently are similar and reflect similar considerations. In practical terms, however, the reasons for preferring the use of performance-based standards in contracting for services and for supplies are quite different.

The basic reason for preferring performance-based specifications in contracting for supplies is to avoid "over-specifying" the government's contractual requirements. The policy is intended to limit the involvement of government employees, and to provide contractors maximum flexibility in meeting the government's actual needs. As long as the government's need for an item is defined sufficiently to be capable of fulfillment, how to fulfill that need is entrusted to the contractor.

In contrast, the basic reason for preferring performance-based specifications in contracting for *services* is to avoid "*under*-specifying" the government's contractual requirements. Unlike a supply contract,[20] the risk is that in the absence of a performance-based standard for a service, the government will fail to define its need well enough to be capable of fulfillment.[21] In that event, the government may be

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[12] *Id.* § 2305(a)(1)(C).

[13] *Id.* § 2301.

[14] *Id.* § 2301(b)(7). This provision was added by section 2721 of the Competition in Contracting Act of 1984, Title VII of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 1186 (1984).

[15] 41 U.S.C. § 253a(a)(3) (1988).

[16] *Id.* § 401. This policy statement was added to the Office of Federal Procurement Policy Act by the OFPP Act Amendments of 1983, Pub. L. No. 98-191 97 Stat. 1325 (1983).

[17] Pub. L. No. 100-463, § 8137 102 Stat. 2270-46 (1988).

[18] The conferees agree with the stated position of the Department of Defense regarding "Bid to Performance"—or the use of performance specifications. This approach seems to offer substantial opportunities for significant savings of time and money in defense acquisition programs by detailed specifications and enabling industry to exercise initiative in developing creative solutions to technical problems. This approach also allows the Department to reduce the number of both military and civilian personnel involved with the acquisitions of defense systems. . . . The Department should achieve savings by reductions in the number of acquisition personnel.

Conf. Rep. to the Department of Defense Appropriations Act for 1989, Pub. L. No. 100-463, 102 Stat.2270 (1988) at 126.

[19] Policy Letter 91-2, *supra* note 2, ¶ 3.a.

[20] Unlike supplies, services generally cannot be stored or warehoused. Consequently, inspection before delivery can be difficult or impossible. Kenneth M. Rowe, *Purchasing Services: An Issue of Intangibles,* NAPM INSIGHTS, Aug. 1991, at 10. Services are considered "challenging to purchase" because they are perceived as intangibles. *Id.* at 11.

[21] Contracting for the performance of a service without first establishing performance-based standards for the contractor is analogous to hiring an employee without providing adequate guidance. Unless the employee—or contractor—knows what constitutes successful performance, little reason exists to expect that the performance will be successful. One important difference in this analogy, however, is that in the absence of a clear performance-based standard the employee may be fired for failure to perform, but the contractor is likely to be rewarded for accommodating the government's needs when they eventually are made known.

obligated to accept whatever service it receives,[22] or to make changes in the work requirements (with a resulting increased contractor compensation)[23] to acquire the service it actually needs. Therefore, OFPP Policy Letter 91-2 actually seeks to *enhance* government control over the contractor's activities in performing the contract, principally by avoiding "broad and imprecise" statements of work that naturally impair, or even preclude, effective management of contract performance.

The Role of the OFPP

Policy Letter 91-2 implements the basic statutory role of the OFPP,[24] which is to "provide overall direction of procurement policy . . . of the executive agencies."[25] The OFPP Administrator also has statutory authority to "prescribe Government-wide procurement policies which shall be implemented . . . and shall be followed by executive agencies . . . ."[26] Indeed, if the FAR councils[27] fail to issue government-wide regulations implementing the policy established by the OFPP, "the Administrator [of OFPP] shall . . . prescribe Government-wide regulations, procedures and forms which shall be followed by executive agencies . . . ."[28] Accordingly, although the *FAR* councils have characterized OFPP Policy Letter 91-2 as a "suggestion,"[29] the policy letter has somewhat more force. In effect, OFPP policy letters establish government-wide policies that *must* be incorporated into the FAR.

The new policy articulated by the OFPP in Policy Letter 91-2, however, is not entirely new. In October 1980, the OFPP issued its *Pamphlet # 4,*[30] which stated the following:

> 1-3. Government Policy. The government policy in service contracting is as follows:
>
> a. The performance oriented statement of work (SOW) for a service contract includes the standards of performance and acceptable quality levels.
>
> b. Standards must be measurable.
>
> c. Quality control is a contractor responsibility.
>
> d. A performance oriented SOW must not contain detailed procedures unless absolutely necessary. Rely [sic] on a statement of the required service as an end product.[31]

The eighty-nine-page pamphlet—written for contracting personnel and for mid-level managers who write contract requirements—emphasized the statement of work as a means of establishing accurate contract needs and the QA Surveillance Plan as the means of ensuring "that the contractor has actually performed the services required."[32]

Observing that the government enters contracts to acquire a broad range of services,[33] *Pamphlet # 4* introduced a "new technique . . . called job analysis." The technique consists

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[22] The Department of Veterans' Affairs (VA) Inspector General found that a VA medical center had overpaid the University of Miami $480,000 for medical services but was unable to pursue a refund. According to the United States General Accounting Office, "the medical center could not press for a refund because the contract statement of work did not describe adequately and specifically the characteristics of the work to be done." GENERAL ACCOUNTING OFFICE, VA HEALTH CARE: INADEQUATE CONTROLS OVER SCARCE MEDICAL SPECIALIST CONTRACTS 13-14 (1992) (GAO/HRD-92-114) [hereinafter GAO REPORT].

[23] *See* FAR 52.243-1 (including Alternates); 52.243-2 (including Alternates); 52.243-3.

[24] The OFPP is an office within the Office of Management and Budget. 41 U.S.C. § 404(a) (1988).

[25] *Id.* § 405(a).

[26] *Id.*

[27] The "FAR Councils" are the Defense Acquisition Regulation (DAR) Council and the Civilian Agency Acquisition (CAA) Council. The FAR Council was created by § 4 of the Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. 100-679, 102 Stat. 4055 (1988). It consists of the OFPP Administrator, the National Aeronautics and Space Administration (NASA) Administrator, the GSA Administrator, and the Secretary of Defense.

[28] 41 U.S.C. § 405(b) (1988). The OFPP was given the authority to prescribe government-wide regulations, procedures, and forms when it was created in 1974 by Pub. L. 93-400, 88 Stat. 796 (1974). The authority was rescinded in 1979 by Pub. L. 96-83, 93 Stat. 648 (1979), but restored in 1983 by Pub. L. 98-191, 97 Stat. 1325 (1983).

[29] 57 Fed. Reg. 33,702, July 30, 1992.

[30] *OFPP Pamphlet #4* was designated Supplement #2 to *OMB Circular No. A-76.* The OFPP described this pamphlet as "an outgrowth of concepts and ideas developed by the Air Force Logistics Management Center, Gunter Air Force Station, Alabama."

[31] OFPP Pamphlet #4, at 5.

[32] *Id.* at 2.

[33] Among the services specifically mentioned in the pamphlet's introduction are: transportation, refuse collection, food services, and janitorial services. The introduction to the pamphlet also notes that at some locations contractors "provide an entire support function, including engineering and supply." When it initially proposed Policy Letter 91-2, the OFPP noted that the government contracted for more than $70 billion of services in fiscal year (FY) 1989. 55 Fed. Reg. 37,991 (1990). In issuing the final version of Policy Letter 91-2, the OFPP updated its estimate to more than $80 billion in FY 1990. 56 Fed. Reg. 15,110 (1990).

principally of a tree diagram that breaks down each contractor operation—viewed as a system[34]—into its component parts and subparts, each with its own input, work process, and output. Some outputs are consumed or altered further by the contractor's operation; *performance indicators* are established, which permit measurement of some aspect or characteristic[35] of other outputs[36] selected from the remainder.

Each performance indicator is accompanied by a performance standard and an acceptable quality level (AQL). In the context of a statement of work, the standard establishes the level of performance expected by the government and the AQL establishes the acceptable deficiency or error rate. For example, the pamphlet hypothesizes a taxi service, for which the performance indicator is timeliness of customer pickup. The contractual performance standard for taxi timeliness is that the customer "must be picked up within 4 minutes of the agreed upon time." The AQL, or acceptable error rate, is five percent—that is, the taxi is permitted to be more than four minutes late no more than five percent of the time—under the contract, failure to perform within the AQL is to result in a price reduction.[37]

Therefore, the job analysis identifies the relevant outputs for which measurable performance indicators may be established. These indicators, in turn, have associated standards and acceptable error rates.[38] The selection of which outputs to measure is a matter of judgment, and is extremely important. Those selected become the basis for the statement of work,[39] including the development of appropriate standards and acceptable error rates.[40] They also become the basis for the QA surveillance plan.

Back to the Future

The various initiatives seeking to implement performance-based management in the public and private sectors[41] generally have focused on internal management and behavior; they have not necessarily been applied to contract management, even though the basic concepts of incentives[42] and accountability would seem to have equal applicability in dealing with contractors.[43]

For example, the government's civilian performance appraisal system generally requires the establishment of "performance elements" that "describe the actual work to be performed" by an employee holding a particular position.[44] They specify "the employee's major duties and responsibilities . . . including important tasks and projects that contribute to [the organization's] goals and for which the employee will be held accountable."[45] Each performance element is required to be

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[34] OFPP Pamphlet #4, ¶ 1-4.

[35] The characteristic of the output—as long as it is measurable—may be quantitative or qualitative.

[36] [Performance indicators are] specific measures of service quality. . . . [Examples of performance indicators] include numbers such as the percentage of trees needing replacement that are replaced within two months; the percentage of job trainees who get jobs, their average wage at placement, and the satisfaction level of their employers; the percentage of participants in a recreation program who rank it 'good' or above; and the number of complaints about recreation facilities.

DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 144 (1992).

[37] OFPP Pamphlet #4, fig. 3-1. This example does not purport to be a model, but merely illustrates the terminology. For example, prescribing *how often* the taxi service may be late does not address *how late* the taxi service may be.

[38] An effective measure of performance should be easy to apply, simple, and understandable; facilitate the easy collection of data in a timely fashion; be meaningful; and be quantifiable and time related. Thomas J. Collins III, *Implementing New Performance Measures,* NAPM INSIGHTS, Sept. 1992, at 30.

[39] "[M]ost important, a measure must drive appropriate actions. Make sure you measure what you want to accomplish." *Id.* at 30. Stated another way, "What Gets Measured Gets Done." OSBORNE & GAEBLER, *supra* note 36, at 146.

[40] OFPP Pamphlet #4, ¶ 2-2.b.

[41] Examples include widely-recognized initiatives, such as Management By Objectives (MBO); Pay for Performance, see 5 U.S.C.A. § 5301 (West 1988); and Total Quality Management (TQM).

[42] The term "incentives"—which includes "rewards" and "punishments"—obscures a potentially important distinction between how performance-based management is applied to contractor performance and how it is applied to internal employees. Even though punishment—that is, "disciplinary action"—is common in an employment context, a "penalty" (punishment) probably will not be sustained in the context of a services contract. *See infra* text accompanying note 58.

[43] One essential distinction between government contracting and concerning employee performance, is the employer's interest in providing appropriate incentives to stimulate productive behavior by the employee. In government contracting, however, a broad prohibition exists against taking such action with respect to a contractor's employees. *See* FAR 37.104(b) (prohibiting the award of a "personal services contract" unless specifically authorized by statute). A "personal services contract" is a contract which, by its terms or as administered, makes the contractor's personnel appear to be government employees. FAR 37.101. Consequently, for purposes of government contracting, one must distinguish between the work and the worker, and measure and evaluate the contractor's performance rather than the effort or activity of the contractor's individual employees.

[44] Air Force Form 860 (Feb. 1987).

[45] *Id.*

accompanied by at least one "performance standard" that describes "the minimal level of accomplishment necessary for Fully Successful performance;" it usually is expressed "in terms of quantity, quality, timeliness, and manner of performance."[46]

Like *Pamphlet # 4,* these initiatives relating to performance-based management have tended to emphasize the management need to measure and provide appropriate incentives for output, rather than input. One example of the difference is the compensation of nursing homes for Medicaid patient care in Illinois. Initially, the State Department of Public Aid paid nursing homes more money to care for patients who were bedridden, and who therefore required more care. One consequence was an increasing proportion of nursing home residents who were bedridden; in effect, the state's rewarding of the input (extra care) rather than the desired output (renewed good health) created a disincentive for the desired output. Devising and implementing a set of performance-based measures—such as patient satisfaction, degree of family participation, and quality of nursing home environment—successfully refocused the efforts of the nursing homes.[47]

Therefore, the distinction between contractor inputs and contractor outputs is critical for purposes of performance measurement. A further significant refinement of the analysis is the distinction between *output* and "*outcome.*" The latter refers to the effect or impact of an output on the recipient (or customer).[48] As observed by Osborne and Gaebler, "*outputs* do not guarantee *outcomes*."[49]

One dramatic illustration of the difference between output and outcome involves physicians. The saying that "the operation was successful, but the patient died" demonstrates rather starkly the difference between output (successful surgery) and outcome (death). The Pennsylvania Health Care Cost Containment Council (PHCCC Council) highlighted that difference in a recent report intended to provide "reliable outcome information at the physician level" concerning coronary bypass surgery.[50]

The report names fourteen heart surgeons with a higher than predicted death rate and two with a higher than predicted survival rate.[51] Some physicians and hospitals involved have challenged the validity and merit of the report on a variety of grounds, including one of particular interest: "You could be a virtuoso in the operating room and get untoward outcomes because of how care in the hospital is organized and delivered."[52] This comment graphically illustrates that to the patient—or customer—the "untoward outcome" (death) is more important than the surgeon's output.[53]

An additional example is helpful to understand the difficulty in applying performance-based contracting methods to government activities. In 1991, the General Accounting Office (GAO) criticized the manner in which the Environmental Protection Agency (EPA) assessed its own effectiveness, "[M]easuring changes in environmental conditions, rather than agency activities, would provide EPA with a more meaningful indicator of the effectiveness of its environmental protection efforts."[54] The GAO explained that instead of basing its program assessment and resource allocation on such measurable outcomes, "[the] EPA has generally used activity-based indicators, such as the numbers of regulations issued or enforcement actions taken, as measures of program effectiveness."[55] Once again, an important distinction between output and outcome exists.

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[46] *Id. See generally* FEDERAL PERSONNEL MANUAL, ch. 335.

[47] *See* OSBORNE & GAEBLER, *supra* note 36, at 138-9 (1992). With respect to compensation based on inputs rather than outputs, proposed FAR 37.202-3(b) directs agencies to avoid the use of "level of effort" arrangements whenever possible. 57 Fed. Reg. 33,702 (1992).

[48] OSBORNE & GAEBLER, *supra* note 36, at 138. The difference between output and outcome may be described as the difference between the quantity of units produced (output) and the effectiveness of that production—that is, the degree to which it causes the desired result. *Id.* at 356. For example, if the service is "street sweeping," a measure of the output would be "miles swept" and a measure of the outcome would be a rating of "street cleanliness." *Id.*

[49] *Id.*

[50] Ron Winslow, *Pennsylvania Heart Surgeons Rated by State,* WALL ST. J., Nov. 1, 1992, at B1. The report also named seven hospitals with higher than expected death rates and four with lower than expected death rates. Earlier reports by various agencies had compared the mortality rates and costs of hospitals, but had not measured the performance of individual physicians directly.

[51] The report also named 31 surgeons who had performed fewer operations than the minimum needed for a proper evaluation of their performances.

[52] This comment was attributed to David B. Nash, Director of Health Policy and Clinical Outcomes at Thomas Jefferson University Hospital, Philadelphia, Pennsylvania. Winslow, *supra* note 50, at B1.

[53] Making the patient survival rate the only measure of a doctor's performance could provide a strong incentive to refuse treatment to high-risk patients. The report states that the data were adjusted for the level of risk involved in the particular surgical procedures.

[54] GENERAL ACCOUNTING OFFICE, OBSERVATIONS ON THE ENVIRONMENTAL PROTECTION AGENCY'S BUDGET REQUEST FOR FISCAL YEAR 1992 at 6 (1991) (GAO/T-RCED-91-28).

[55] *Id.* at 8; *see also* GOVERNMENT ACCOUNTING OFFICE, ENVIRONMENTAL PROTECTION AGENCY: PROTECTING HUMAN HEALTH AND THE ENVIRONMENT THROUGH IMPROVED MANAGEMENT (1988) (GAO/RCED-88-101).

With respect to resource allocation, the PHCCC Council reported the range of average hospital charges for coronary bypass surgery, but did not address the relationship (if any) between price and successful performance. The report, however, which is designated "a consumer guide," will enable the purchasers of health care to "vote with their feet" in their choices of health care provider. When selecting a physician or hospital, the purchaser[56] can weigh the predicted rate of successful outcome against price.

OFPP Policy Letter 91-2

Similarly, the OFPP expects that one key result of the use of performance-based contracting for services will be to substitute "an approach that emphasizes quality of performance along with price" in place of "the prevailing strategy for many acquisitions of 'lowest price and minimal acceptable quality.'"[57] The policy letter directs that "[a]gencies shall use competitive negotiations for acquisitions where the quality of performance over and above the minimum acceptable level will enhance agency mission accomplishment and be worth the corresponding increase in cost."[58]

The OFPP expects that competitive negotiation will be used to implement performance-based contracting for "most technical and professional services," and contracting activities are encouraged to use the following "quality-related factors" in evaluating offers: the offeror's technical capability; management capability; cost realism; and past performance."[59] According to the policy letter, these factors will receive "increased emphasis" when the contractual performance requirements "are more complex and less clearly defined."[60]

With respect to contract type, a fixed price contract is appropriate for "services that can be objectively defined . . . . Services that are routine, frequently acquired, and require no more than a minimal level of performance mainly fall into this category."[61] A cost reimbursement contract, however, is appropriate for services that "can only be defined in general terms and for which the risk of performance is not reasonably manageable." This category includes "[c]omplex or unique services for which quality of performance is paramount."[62]

The policy letter states that "to the maximum extent practicable," contracts should include incentives to encourage good

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[56] The health care purchaser may be an individual patient or some other party, such as a corporate employer. For example, Hershey Foods, Inc. has announced that it would use the data provided by the PHCCC Council report to select hospitals for its employee health care plan. Winslow, *supra* note 50, at B8.

[57] Policy Letter 91-2, *supra* note 2, summary.

[58] *Id.* ¶ 5.c.

[59] *Id.* The proposed FAR 37.202-3(a) notes that either sealed bid or competitive negotiating procedures can be used for performance-based contracting, but provides that "[n]egotiated procedures [sic] are used when quality of performance is a significant factor, as is generally the case in professional and technical services." 57 Fed. Reg. 33,702 (1992).

[60] Policy Letter 92-1, *supra* note 2, ¶ 5.c. These factors focus on the quality of the prospective contractor—not the quality of the contract performance. Therefore, the OFPP apparently suggests that if a task is complex and not susceptible to precise definition, the agency involved should at least seek a reliable and trustworthy contractor.

The OFPP's rationale is not entirely clear. Defining the contractor's output in terms that permit comparison with measurable standards seems to be the essence of performance-based contracting. If so, the complexity of the task itself would be irrelevant; to put it bluntly, "results are what counts." The outcome of a complex task may be easier to evaluate than the output of a routine task. Cardiac surgery is a complex task, but evaluating the outcome—that is, life or death—is not necessarily so complex. In contrast, evaluating a "routine" activity—such as a telephone answering service provided by a contractor—may be more difficult. Absent a flood of complaints, the contracting officer may have difficulty evaluating the extent to which calls are misdirected, messages are recorded inaccurately, or misinformation is given to callers.

The real issue is not whether the task is complex, but whether the government is capable of defining and measuring successful performance. In a sophisticated research project, for example, the government is, by definition, unable to predict what the research will disclose. The government can (1) require that certain avenues of research will be investigated; (2) establish criteria for pursuing or abandoning a particular avenue of research; (3) specify questions to be investigated or answered by the research; and (4) require that professional standards be met in performance of the research, such as in the collection and analysis of data. The complexity and sophistication of the research, however, may limit the government's ability to establish meaningful performance standards in the statement of work. For an example of the partial use of performance standards in a level of effort contract for research, see American Standard, Inc., ASBCA No. 15,660, 71-2 BCA ¶ 9109. The government "retained for itself a broad contractual right to designate the specific programs to be developed and even the order in which such development would take place, and to make these determinations as the work progressed. . . ." *Id.* Many of the research decisions and priorities were established at the outset. Establishing all the actual decision criteria in advance would have made the level of effort arrangement unnecessary, but may not have been possible.

Scientific research is one of several fields in which success is based on combinations of insight, special knowledge, unusual skills, and perhaps artistry. In such fields the use of performance-based contracting should encourage and channel creativity and insight by rewarding results. To the extent, however, that it merely prescribes orthodox processes because of the government's inability to define success, it is likely to stifle creativity and frustrate the type of contractor that performance-based contracting is intended to encourage. That creativity is "a subjective element" adds to the difficulty of establishing appropriate performance standards. James M. Trodden, *Purchasing Creative Services,* NAPM INSIGHTS, Feb. 1992, at 24.

[61] Policy Letter 91-2, *supra* note 2, ¶ 5.d.

[62] *Id.*

performance and "discourage unsatisfactory performance."[63] Incentives are to be "based on measurement against predetermined performance standards . . . ."[64] The proposed FAR 37.202-4 would add that, to the maximum extent practicable,

> performance incentives, either positive or negative or both, shall be incorporated into the contract to encourage contractors to increase efficiency and maximize performance (see [FAR] Subpart 16.4). These incentives shall correspond to the specific performance standards in the quality assurance plan and shall be capable of being objectively measured.[65]

The OFPP asserts that the use of performance-based contracting for services will promote quality, economy, and innovation.[66] The OFPP sought to address the specific problems of the use of unnecessarily vague statements of work; insufficient use of incentives for improved performance—such as fixed price or incentive fee pricing; and the lack of adequate contract administration plans. The key to the OFFP's remedy is a demand for greater accountability on both the government and the contractor.

The need for greater government accountability derives from its responsibility to define the work to be performed. The policy letter calls on the government agency to define contractual work so that the results of performance can be measured, and for the government to establish predetermined standards against which to compare the measured performance. Depending on the nature of the service that the contractor is to perform, this responsibility can be daunting and, in some instances, may be impossible. The existence of a clear performance standard, however, appears to be a necessary predicate for assigning to the contractor increased responsibility for the risks related to performance.[67]

In the absence of performance-based standards, terminating a service contract for default often is difficult because of the burden of defining and proving default. Moreover, when a contractor's performance is plainly unsatisfactory and probably in default, an agency may avoid terminating for the convenience of the government because it believes that doing so could make a bad situation worse.

One such situation arises when an agency lacks the qualified personnel or authorized positions to perform the service in-house.[68] In the absence of meaningful contractual performance standards, the agency may have no reason to believe that a replacement contractor's performance would be more satisfactory. Consequently, terminating the existing contract and seeking a replacement contractor merely would consume time and resources to no avail. This problem can be even

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[63] *Id.* The concept of "discouraging" unsatisfactory performance by the contractor is potentially dangerous and must be applied judiciously. For example, many government construction contracts provide for the contractor to pay the government liquidated damages in the event that performance is late. Yet, when the amount of liquidated damages is found by a court or board to be punitive rather than compensatory, the liquidated damages provision is denied effect. Sun Printing & Pub. Ass'n v. Moore, 183 U.S. 642 (1902).

When liquidated damages are used as a threat to spur on performance by holding the contractor "in terrorem," they are disallowed. *See* H.H. Reisman, GSBCA No. 3262, 72-1 BCA 9223 (1971) (the board rejected the government's assessment of liquidated damages in the amount of $1.3 million—the only damage to the government was $100—as punitive and not compensatory). When the contractor challenges an assessment of liquidated damages as a penalty, the Government must demonstrate how the amount was calculated before contract formation and that the amount was compensatory and not punitive. United States Floors, Inc., ASBCA No. 36,356, 88-3 BCA ¶ 21,153, *vacated,* 89-1 BCA ¶ 21552.

[64] Although attempting to "discourage" unsatisfactory performance is risky, it can be done successfully. No absolute prohibition against reducing the contract price equitably exists when performance is substandard. *See, e.g.,* FAR 52.246-2(h) Inspection of Supplies—Fixed-Price Contracts clause; FAR 52.249-8(f), (g) Default (Fixed-Price Supply and Service) (partially completed supplies included in "manufacturing materials").

Just as an assessment of liquidated damages will be sustained if it fairly represents anticipated injury to the government, positive and negative incentives for improved performance predictably will be sustained if they demonstrably are *based on differences in the value received by the government.* A contract term that provides for higher payment to the contractor for greater value delivered, and lower payment to the contractor for lesser value delivered, is on its face compensatory, not punitive. Therefore, particular attention should be given to the OFPP's declaration that encouraging good performance and discouraging poor performance must be based on predetermined contractual standards. Moreover, failure to apply a predetermined standard consistently may suggest that its application is not based on value received, but on other considerations that a board or court may not sustain. Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).

[65] 57 Fed. Reg. 33,702 (1992); *see* FAR 16.402-2. The requirement that the incentives be established in terms of objective and measurable performance standards included in the QA surveillance plan provides some assurance that the incentives will be related in some way to actual performance. A related risk, however, is that the proposed *FAR* section may encourage the contracting officer to base incentives on those performance factors that are easy to measure, and not those that are the most important or the most critical to successfully perform the contract.

[66] Policy Letter 91-2, *supra* note 2, summary.

[67] *See supra* note 22 and accompanying text.

[68] For a discussion of fundamental internal services that agencies have contracted out, see GOVERNMENT ACCOUNTING OFFICE, ARE SERVICE CONTRACTORS CONTRACTING OUT INHERENTLY GOVERNMENTAL FUNCTIONS? (Nov. 1991) (GAO/GGD-92-11). The definition of "inherently governmental functions" has been addressed in OFPP Policy Letter 92-1, 57 Fed. Reg. 45,096 (1992).

more difficult if the service involves highly specialized knowledge or skill, so that very few prospective contractors have the capability to perform the work.[69]

A similar situation occurs when the agency anticipates that the existing contractor, whose performance is unsatisfactory, may submit an offer if the contract is terminated for convenience and offers are resolicited. If the agency resolicits offers without further defining or specifying the performance standards, the agency has no basis for excluding that contractor from competing for the new contract. Therefore, a termination for the convenience of the government actually would not benefit the government; the situation would not have changed, except that the cost of this exercise could include not only time and resources, but also a potentially devastating effect on the morale of the agency personnel involved.[70]

To an agency that has had difficulty with its contract management function, the requirement that performance-based contracting be used "to the maximum extent practicable" probably will seem to be merely an additional burden, and one that can be avoided by carefully choosing the words for a written justification to be placed in the contract file.[71] Ironically, such an agency would be one of the principal beneficiaries of performance-based contracting, if it can make the initial investment of time and attention needed for partial implementation.

Performance standards are established for one service contract at a time, or one type of service contract at a time. Once the agency defines certain contractual work in a manner that permits (1) measurement of the results of the contractor's performance and (2) comparison with predetermined standards, surveillance and management of the contractor's performance should become more efficient.

Of particular importance is that Policy Letter 91-2 specifically encourages refining the statement of work through the use of draft solicitations.[72] The statement of work is the principal vehicle for implementing performance-based contracting because it defines the contractor's performance requirement and its associated standards.[73] In addition, because the QA surveillance plan is intended to measure contractor performance against the standards set forth in the statement of work,[74] the plan and the statement of work must be coordinated with each other. Accordingly, publishing a draft solicitation or draft statement of work logically would solicit comment concerning not only the performance standards, but also how to measure compliance with those standards.[75] This information can be especially valuable to agencies planning to

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[69] The United States Department of Energy (DOE) has developed an interesting approach to cleaning up radioactive waste at its nuclear weapon sites—use of an Environmental Restoration Management Contractor (ERMC) that subcontracts all but the management and oversight of the cleanup effort. According to the DOE, the skills needed for disposal of radioactive waste and mixed radioactive or hazardous waste generally are not available beyond the small group of contractors that already have cleanup contracts with the DOE. GOVERNMENT ACCOUNTING OFFICE, DOE MANAGEMENT: IMPEDIMENTS TO ENVIRONMENTAL RESTORATION MANAGEMENT CONTRACTING 5 (1992) (GAO/RCED-92-244). The DOE proposed a five-year test of the ERMC approach, with success based on (1) the contractor's meeting clean-up milestones for the sites involved in timely fashion and (2) the cost savings realized by the government. Although the first pilot project was to begin in September 1992, as of August 1992, the DOE had not been able to establish standards for either timeliness or cost control. *Id.* at 9.

[70] One other consequence may be transforming the contract management problem into a question of whether the agency was operating in good faith.

[71] OFPP Policy Letter 91-2, *supra* note 2, ¶ 5.

[72] Proposed FAR 37.202-1(d) requires agencies, "to the maximum extent practicable," to "[c]onsider issuing draft statements of work to assist in refining statements of work." 57 Fed. Reg. 33,702 (1992).

[73] Proposed FAR 37.202-1 requires that the statement of work "define the requirements in clear, concise language identifying specific tasks to be accomplished" and, *inter alia,* identify "the desired degree of performance flexibility." The agency is directed—to the maximum extent practicable—to (a) describe the work in terms of what the required output is, rather than prescribe the work process or the number of hours of work to be expended; (b) "[e]nable assessment of work performance against measurable performance standards"; and (c) use measurable performance standards and financial incentives to encourage prospective contractors to develop innovative and more cost-effective methods of performance.

[74] The proposed FAR 37.202-2 would require the QA surveillance plan to "contain measurable inspection and acceptance criteria corresponding to the performance standards contained in the statement of work. The quality assurance plans shall focus on the level of performance required by the statement of work, rather than the methodology used by the contractor to achieve that level of performance." 57 Fed. Reg. 33,702 (1992).

[75] Depending on the nature and complexity of the service involved, an agency's establishment and refinement of its own performance standards may have a high initial cost in terms of time and disruption. One way to minimize these costs is to hire a contractor to develop draft performance standards for some or all of the services that the agency buys.

A similar arrangement has become common in the health care field—particularly among "utilization review organizations" (URO). A URO is an external organization hired by a health insurance firm to advise whether proposed medical treatment is appropriately paid for by the insurer. The URO establishes health care criteria and standards to apply in making recommendations concerning individual patient care. A study by the GAO disclosed that two-thirds of UROs develop their own health care standards and criteria; one-third hire consultants to develop health care standards and criteria, subject to the URO's own modification or adaptation. *See* GOVERNMENT ACCOUNTING OFFICE, UTILIZATION REVIEW: INFORMATION ON EXTERNAL REVIEW ORGANIZATIONS 55-56 (1992) (GAO/HRD-93-22FS).

Similarly, many firms hire consultants to advise them on their own internal organizations and compensation structures. This commonly occurs when a firm introduces a new "pay for performance" compensation plan, in part because the external firm is seen as disinterested and, therefore, better able than internal personnel to develop objective performance standards.

enter contracts for unusual, unfamiliar, complex, or highly technical services.

For example, if an agency is contracting for a service because the agency itself lacks the thorough knowledge or sophistication needed to perform the service, the agency can invite each prospective contractor to explain how to gauge the effectiveness of its performance. Although prospective contractors would be expected to differ as to the relative importance of the various criteria, this can be an effective means of learning what performance indicators are important and what standards may be appropriate.[76] Further, asking prospective contractors how to evaluate the quality or quantity of their performances is a relatively easy way to share the burden with them.[77] All prospective contractors for a particular type of service, for example, might suggest or agree on certain performance indicators; if so, those performance indicators are probably relevant to successful performance.

Some agencies have the necessary level of knowledge and sophistication to perform the service to be contracted out—such as scientific research or testing—but lack the personnel or other resources to do so. Inviting prospective contractors to define superior performance and how to measure it can help translate an agency's needs into terms with which its contract managers can work more readily. Prospective contractors are in the business of marketing themselves and their capabilities; they certainly are well equipped to explain why their performances will be satisfactory—that is, to articulate appropriate performance standards and means of measuring successful performance.

Additionally, inviting prospective contractors to suggest how their contract performances should be evaluated could help establish incentives that encourage excellent performance and "discourage" poor performance. Appropriate performance standards or incentives otherwise might not occur to a contract manager who lacks expertise in the sophisticated subject matter of the research, or to a technical subject matter expert who lacks an understanding of contract management.

Likewise, the effect of performance-based contracting on competition deserves comment. To the extent that this policy causes the statement of work to be more specific or precise, competitive proposals or sealed bids submitted by prospective contractors will be focused more sharply. One result is that prospective contractors will be submitting competing offers on the same output, rather than on potentially different interpretations of the same effort.[78] Therefore, performance-based contracting for services likely will avoid the costs associated with ambiguous specifications and constructive changes, as well as the administrative and litigation costs associated with disputes based on those issues.

On the other hand, a statement of work that includes specific performance standards and incentives will suggest to prospective contractors a reduced opportunity for lucrative modifications. Consequently, the initial prices for such contracts may be higher than anticipated by the agency, although any initial price increase presumably would be more than offset by eliminating avoidable—and noncompetitive— modifications.[79]

Because performance-based contracting affects contract prices, one benefit of this policy may be to enhance popular respect for government contracting.[80] Certainly the concept of incentives based on objective standards of performance is appealing. Objective standards, however, are not immune to manipulation; they may be perceived as merely providing a new fig leaf for decisions that are not made on the basis of the stated criteria.

One final point requires mention: implementation of performance-based contracting likely will have a steep learning curve.

> Measuring profit in business is fairly straightforward. Measuring results in government is not. Normally it takes several years to develop adequate measures; an agency's first attempt often falls woefully short. It may measure only outputs, not outcomes. It may define outcomes too narrowly, driving employees to concentrate on only a few of the results the organization actually

[76] Inviting prospective contractors to help fashion performance standards also can be risky. The performance indicators and standards recommended by contractors may reflect the contractors' own strengths and weaknesses—not an objective view of government needs. Furthermore, just as the marketplace features sellers who are interested in sales rather than customer satisfaction, some prospective contractors predictably will seek to compete on the basis of irrelevant criteria and will try to persuade the agency of the importance of those criteria as performance standards. Of course, the agency need not accept any of these suggestions.

[77] Recall, for example, the DOE's delay in establishing timeliness and cost standards for its ERMC pilot project, discussed *supra* note 69. The small number of contractors reported by the DOE as qualified for this type of work, however, suggests that competitive forces may not operate effectively in this situation.

[78] For true competition to exist, the prospective contractors must have a common understanding of the work requirement. This is especially important when the performance standard involved prescribes the *quality* of the work to be performed.

[79] The introduction of performance-based contracting should make contract management easier and more effective and help the agency to better define its actual needs. In one instance that might have been avoided by performance-based contracting, the VA Inspector General found that six VA medical centers had paid $1.7 million for medical specialist services that were either not provided or not needed in the first place. GAO REPORT, *supra* note 22, at 13.

[80] "Build[ing] public confidence in Federal procurement practices with a visible improvement program. . . ." is one of the ways that the OFPP was expected to improve federal procurement operations when it was created. 1974 U.S.C.C.A.N. 4593.

> wants to achieve. It may develop so many measures that employees can't tell what to concentrate on.[81]

This transition undoubtedly will generate litigation. The new policy and *FAR* requirements will cause government agencies to redefine "work" and to establish new standards and incentives for successful performance. The reorientation and re-education of government personnel in the art of defining services in terms of "products" necessarily will result in a measure of uncertainty in the definitions and standards created by the agencies, which—at least in the near term—will be reflected in uncertainty in solicitations and contracts. Consequently, even though the policy promises to reduce waste in government contracting over time, its initial implementation well may feature increased ambiguity and litigation over the award of government contracts.

As the author of this situation, the OFPP should assist government agencies seeking to implement Policy Letter 91-2. Although performance standards necessarily will vary from one contract to another, from one service to another, and from one agency or department to another, the OFPP should not cut government agencies adrift and require each agency to "reinvent the wheel." The OFPP's planned issuance of a revised version of *OFPP Pamphlet #4*,[82] will help, but more is needed.

An agency should be able to learn from the actions and mistakes of other agencies, rather than having to make each mistake itself. Because virtually every service is purchased on contract by multiple federal agencies, agencies should help each other by sharing the performance indicators and standards they devise in purchasing services. The proposed FAR 37.403,[83] defines the "outputs" of several types of services.[84]

One appropriate vehicle is for the OFPP to serve as a "clearinghouse" for performance-based contracting standards. Serving in this capacity could help "flatten" the learning curve and help the government in avoiding costly lessons and unnecessary expenditures. This approach also would be consistent with the OFPP's role as coordinator and overseer of Executive Branch procurement. This function actually was one of the reasons for creating the OFPP.[85]

In the alternative, the OFPP could assign or invite specific agencies to serve as the lead agencies for specific types of services—such as the GSA for computer and building management services, and the OPM for office management services. If interagency relationships preclude such arrangements, perhaps some of the federal schools,[86] universities[87] or programs relating to services contracting would be suitable sites.

The policy of applying performance-based standards to government contracting for services can be effective if implemented constructively. It has the potential to be highly cost-effective, and to enhance the management of service contracts. The policy should not be allowed to fail because of lack of guidance and coordination.

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[81] OSBORNE & GAEBLER, *supra* note 36, at 349.

[82] See *supra* text accompanying note 26. The OFPP plans to issue the revised pamphlet after *FAR* regulations implementing Policy Letter 91-2 are made final.

[83] 57 Fed. Reg. 33,702 (1992).

[84] The proposed definitions in FAR 37.403 are cited to illustrate the practicability of making such guidance available to government agencies. Those definitions—which were not intended specifically to serve as model performance indicators or standards—need some work. In the category of "Management and professional support services," for example, one form of such service is identified as "training." Proposed FAR 37.403(c). The listed "outputs" are "Services in the form of information, opinions, advice, training, or direct assistance that lead to the improved design or operation of managerial, administrative, or related systems." Consequently, the output of the service called "training" seems to be "training." Nevertheless, because "training" also is the "input," the definition seems circular. This difficulty is not surprising. Commentators rigorously and persistently disagree as to the measures that should be used to evaluate teaching ability and performance.

Proposed FAR 37.403(c) refers to the expected "outcomes"—that is, improved design of managerial systems—in defining the "outputs." Although the proposed definitions are a helpful beginning, they demonstrate the need for (1) precise terminology and (2) coordination of agencies' efforts to define performance indicators and performance standards.

[85] At the time of its creation, the OFPP was expected to improve the government's procurement operations. One way mentioned by the conference committee was to "[b]ring about government-wide exchange of successful ideas and thereby increase efficiency and economy in government operations." 1974 U.S.C.C.A.N. 4593.

[86] The Defense Systems Management College (DSMC) or the Naval Post-Graduate School could serve as sites.

[87] The School of Systems and Logistics at the Air Force Institute of Technology, a component of Air University, could serve as a site.

Improving the Report of Survey Process

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Introduction

A judge advocate (JA) must review each report of survey (survey) that contains a recommendation for financial liability.[1] All too frequently, the reviewing JA will determine that the report of survey is "not legally sufficient." This wastes the time of both the reviewing JA and the command that submitted the survey. The JA will have had to complete a lengthy legal review[2] and the command's processing of the survey will be delayed.[3]

This article is designed to improve the report of survey process with the goal of leading to the submission of a higher percentage of legally sufficient surveys. Accordingly, the article focuses on the ways JAs can assist officers who are conducting reports of survey. This assistance can be summarized as follows: get involved early in the survey process; get the word out that you want to help; give classes; check the survey before you accept it for review; call the survey officer before you return a "not legally sufficient" survey; and ensure that the survey truly is not legally sufficient before you return it.

Get Involved Early in the Survey Process

Army Regulation 735-5 (AR 735-5) directs a survey officer to consider the survey as his or her primary duty.[4] Nevertheless, few survey officers treat it as such. Two factors contribute to this outlook. First, the survey officer may view the survey as an additional duty and want to complete it as soon as possible. Second, the report of survey regulation is complicated,[5] often contradictory,[6] and contains scattered provisions affecting the survey process.[7]

Additionally, most survey officers receive little, if any, guidance from the appointing authority (or more commonly from the logistics officer, or S4). Often, the S4 simply hands the survey officer a copy of *Department of the Army Form 4697*, "Report of Survey"[8] (sometimes with a copy of the regulation) and tells the survey officer to "get it done." Consequently, many surveys contain findings such as, "he signed for it; so, he's liable." Such reports are "not legally sufficient" and usually require a lengthy explanation of why the survey is not legally sufficient and what the survey officer must do to correct it.

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[1] DEP'T OF ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY: POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY, para. 13-39 (31 Jan. 1992) [hereinafter AR 735-5]. The purpose and procedure of *AR 735-5* are reviewed in "A Guide for the Report of Survey Officer," that follows this article.

[2] In addition to giving an opinion of "not legally sufficient," the reviewing judge advocate must "state the reasons why [the survey is not legally sufficient] and make appropriate recommendations." *Id.*

[3] Most commanders are concerned about survey processing time. Frequently, higher level commanders track their subordinate commanders' survey processing times. See *id.* para. 13-5, for processing times. Additionally, a completed survey generally is required to adjust the commander's unit property book. Any delay in processing the survey results in a concomitant delay to property book adjustment. Some exceptions to the general requirement that a survey be completed before the unit property book may be adjusted are set out at *AR 735-5*, paragraphs 14-18 through 14-29. Because the report of survey process is time consuming, alternatives always should be considered whenever the individual admits liability and liability is less than one month's basic pay. *See id.* para. 12-2.

[4] AR 735-5, *supra* note 1, para. 13-29.

[5] The definition of proximate cause is as follows:

> Cause which, in a natural and continuous sequence unbroken by a new cause, produces loss or damage and without which the loss or damage would not have occurred. It can be further explained as primary moving cause or predominating cause, from which injury flows as a natural, direct, and immediate consequence, and without which it would not have occurred.

DEP'T OF ARMY, UNIT SUPPLY UPDATE NO. 13, consolidated glossary, at 15 (31 Jan. 92). Even if a survey officer is fortunate enough to stumble across this definition, its meaning can be difficult to understand.

[6] *See e.g., id.* Summary of Change "[*AR 735-5*] rescinds the use of plain bond paper or ruled paper for recording statements." On the other hand, *AR 735-5*, paragraphs 13-9a(c) and 13-31g(1), authorize use of plain bond or ruled paper in recording statements (known as certificates) but also establish a regulatory preference for DA Form 2823, "Sworn Statement." Alternately, *AR 735-5*, Appendix C, "Specific Considerations for the Survey Officer," directs survey officers to record statements on certificates (which are prepared on plain bond or ruled paper).

[7] Errors in the index aggravate the survey officer's unenviable task of finding all provisions that pertain to the report of survey process. For example, the index lists depreciation as being found in Appendix C and at paragraphs 12-3(b)(1) and 13-32c(1). Appendix C pertains to "Specific Considerations for the Survey Officer"—not depreciation (the correct citation is Appendix B). Chapter 12 ends with paragraph 12-2, and paragraph 13-32c(1) relates to depreciation only tangentially (stating that it is one of the factors the survey officer must consider when completing block 26 through 27c, DA Form 4697, "Report of Survey").

[8] Dep't of Army, DA Form 4697, Report of Survey (Sept. 1981).

Judge advocates can prevent these problems from occurring by becoming involved in the report of survey process as soon as possible.[9] If the JA talks with the survey officer *before* the survey officer starts the investigation, the JA can explain that the regulation requires that completing the survey be the appointed officer's primary duty.[10] More importantly, the JA can focus the investigation by discussing some of the investigation's objectives and *AR 735-5*'s requirements. In so doing, the JA can translate the provisions of *AR 735-5* into something the survey officer easily and rapidly can understand.[11] The "Guide" that follows this article is intended to help the JA accomplish this goal.

Get the Word Out That You Want to Help

Judge advocates who work in administrative law must let the commanders they support know they are willing to assist survey officers at all stages of the report of survey process. This easily can be accomplished by sending a memorandum to all supported commanders or giving classes. No matter how this is accomplished, the JA will find that an investment of time at the front end of the survey process ultimately will reap great rewards.

Give Classes

Battalion or higher level "officer professional development" classes assist both commanders and the office of the staff judge advocate. Let commanders know that you are available to give classes. Prepare a one-hour class based on the "Guide" that follows this article. Strive to define the survey officer's fact-finding mission. Translate the legal requirements of the regulation into simple English. Point out the recurring problems at your installation. Most importantly, tell them that you are available to help.

Check the Survey Before You Accept it for Review

Set a policy that survey officers must go over the survey with you before you accept it for legal review. An in-person review will allow you to identify and resolve problems quickly. For example, if the findings and recommendations are insufficient, you can tell the survey officer how to correct them. If the individual recommended for liability has not been notified, you can point out that notification is a legal requirement.

This in-person review saves time for both you and the survey officer. If the survey is not legally sufficient, you can tell the survey officer how to address the deficiencies and the survey officer will not have to wait several days for your written opinion. If the survey is legally sufficient, you have not lost any time either. You would have had to review the survey anyway; all that is left to do is to draft your "legally sufficient" opinion. The survey officer can go back to the S4 and tell the S4 that the survey has a preliminary "OK" and that the formal legal review will be accomplished by a date certain.

The relationship between an administrative law officer and a survey officer is not adversarial. An administrative law officer ethically may advise a survey officer before accepting the survey for review. Had you not given an oral opinion, you would have given a written opinion. If your opinion was "not legally sufficient," you would explain the survey's deficiencies. The survey then would be resubmitted and you would determine if it complied with your written advice. Therefore, the only difference between a written and oral opinion is that the oral opinion saves time.

Call the Survey Officer Before You Return a "Not Legally Sufficient" Survey

If you receive a survey without having conducted a preliminary screen, or if you reverse your initial oral opinion of "legally sufficient," do not delay matters by typing a formal opinion and then waiting for the survey officer to act. Instead, call whoever formally submitted the survey to you—typically the S4—and ask that individual to direct the survey officer to see you.

You then can discuss the survey face-to-face and ensure that the survey officer understands your advice. If several points need correcting, write your thoughts on a legal pad and hand them to the survey officer during this face-to-face review. You will find that this procedure is much faster than typing a formal review.

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[9] Some judge advocates are concerned that their ethical obligations preclude them from advising report of survey investigating officers. This widely held belief is nonsense. The relationship between the administrative law officer and the survey officer is not adversarial. Consequently, a judge advocate may advise a survey officer during the investigation. *See infra* discussion under the heading "Check the Survey Before You Accept it for Legal Review."

[10] AR 735-5, *supra* note 1, para. 13-29.

[11] The drafters of *AR 735-5* apparently believed that judge advocates will have greater difficulty than line officers in grasping the subtleties of the report of survey process. In the section entitled "Specific Considerations for the Survey Officer," the regulation notes the following:

> Why isn't this important and responsible task (which seems parallel to legal proceedings in civil life) processed by the Judge Advocate General? The Army has determined that the person charged should be judged by a normal, ordinary person like yourself who can recognize right from wrong. You have common sense and are capable of weighing facts and arriving at sound, logical recommendations.

Id. app. C, para. C-1d.

This quotation originally appeared in DEP'T OF ARMY, FIELD MANUAL 10-14-3, SURVEYING OFFICER'S GUIDE (30 Dec. 1981). In his 1984 article in *The Army Lawyer*, Major King quoted the above passage and identified the field manual's deficiencies. Ward D. King, *Reports of Survey: A Practitioner's Guide*, ARMY LAW., June 1984, at 1, 3. The deficiencies were corrected when the field manual was incorporated into *AR 735-5*. The quotation was retained.

Commanders will appreciate your extra effort to make sure that the survey is done correctly. Anything you can do to help commanders with reports of survey will earn you points and make your job easier.

Ensure that the Survey Is Truly "Not Legally Sufficient"

A report of survey can contain two types of errors: administrative and legal sufficiency. Not all errors affect legal sufficiency. Many administrative errors can be corrected and do not require additional legal review.[12] Additionally, even surveys determined to be "not legally sufficient" do not necessarily need to be returned for legal review after correction.[13]

Although the authority for reports of survey is derived from statute,[14] it remains an administrative procedure. Consequently, the less restrictive requirements of administrative due process are applied to the report of survey process.[15]

Two questions must be addressed when determining a survey's legal sufficiency. The first is procedural due process. The Fifth Amendment provides that "no person shall be . . . deprived of life, liberty, or property without due process of law . . . ."[16] Clearly, surveys have the potential to affect an individual's property interest—that is, money. Consequently, before the Army—as an instrumentality of the United States—may assess financial liability against an individual via the report of survey process, due process of law must be extended to that individual. Accordingly, if an error bears on procedural due process, the survey should be found to be "not legally sufficient."[17]

The basic requirements of procedural due process are notice and an opportunity to respond.[18] The notice and response provisions of *AR 735-5* satisfy these basic constitutional requirements.[19] Therefore, when a survey officer fails to notify the individual and afford that individual with an opportunity to respond, the survey is not legally sufficient. In such a case, call the survey officer, explain the notice requirement, and have the survey officer resubmit the survey after considering the individual's response (or noting that the individual failed to respond within the time allowed).

Some courts have ruled that even when a life, liberty, or property interest is not implicated directly, process still may need to be provided. Typically, these cases involve statutes or regulations that extend procedural safeguards to individuals, even though these safeguards are not required by the Constitution. When an agency extends process by regulation, courts usually will require the agency to provide that process.[20]

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[12] For example, the survey officer may have forgotten to include the soldier's basic pay at the time of the loss with the recommendation for liability (as required by *AR 735-5*, para. 13-32c). This omission is administrative error. Your legal review should point out that this administrative error must be corrected, but that subsequent legal review is not required.

[13] For example, the survey officer may have failed to note consideration of an individual's rebuttal (as required by *AR 735-5*, paragraph 13-35b). In a case when liability is clear—and the rebuttal statement does not rebut the findings—the reviewing judge advocate could note that the survey officer must express consideration of the rebuttal, but that once done, subsequent legal review is not required.

[14] 10 U.S.C. §§ 4832, 4835 (1988) (Secretary may prescribe property accountability regulations, to include regulations on conducting reports of survey); *see also id.* § 908 (1988) (UCMJ art. 108—loss, damage, destruction, or wrongful disposition of military property); *id.* § 2636 (deductions from carriers for loss or damage); *id.* § 2775 (liability for members assigned housing); *id.* § 4836 (unauthorized disposition of individual equipment); *id.* §§ 4839-4840 (1988) (settlement of accounts); 5 U.S.C. §§ 5511-5514 (1988) (withholding of pay of civilian employees); 31 U.S.C. § 3531 (1988) (property returns); 32 U.S.C. § 710 (1988) (accounting for property issued to the National Guard); 37 U.S.C. § 1007 (1988) (authority to deduct military pay for indebtedness); DEP'T OF ARMY, PAMPHLET 27-21, LEGAL SERVICES: ADMINISTRATIVE AND CIVIL LAW HANDBOOK, ch. 10 (15 Mar. 1992) [hereinafter DA PAM. 27-21].

[15] For a discussion of administrative due process, see DA PAM. 27-21, *supra* note 14, ch. 13.

[16] U.S. CONST. amend. V provides that "no person shall be. . . deprived of life, liberty, or property without due process of law . . . ."

[17] For a discussion of legal requirements affecting the report of survey process, see King, *supra* note 11, at 1; Ward D. King, *Recent Report of Survey Developments*, ARMY LAW., July 1985, at 11.

[18] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (holding that notice by publication to the beneficiaries of a trust violated the due process clause).

[19] An individual recommended for financial liability must be afforded notice of the proposed action and an opportunity to respond in writing before action is taken by the approving authority. AR 735-5, *supra* note 1, para. 13-34b. Notice includes access to the report and its exhibits and the opportunity to respond includes the right to consult with counsel. *Id.* para. 13-34a. If the approving authority accepts the recommendation of liability, the approving authority also must notify the individual and explain the appellate procedure. *Id.* para. 13-43. If an approving authority directs liability after a survey officer has recommended against its imposition, the approving authority must provide the same notice and opportunity to respond that would have been incumbent upon the survey officer had a recommendation for liability been made. *Id.* para. 13-41d.

[20] *See, e.g.*, Accardi v. Shaughnessy, 347 U.S. 260 (1954) (holding that an Immigration and Naturalization (INS) regulation giving an INS board authority to decide certain deportation cases could not be circumvented by the commissioner of the INS); Service v. Dulles, 354 U.S. 363 (1957) (holding discharge of a Foreign Service Officer by the Secretary of State invalid because it violated Department of State regulations); Vitarelli v. Seaton, 359 U.S. 535 (1959) (holding the discharge of a federal employee on the basis of security threat to be invalid because the Department of the Interior failed to comply with security regulations—even though the employee could have been discharged summarily for other reasons).

Therefore, while the Constitution only requires notice and an opportunity to respond, other provisions of the report of survey regulation may impose additional process requirements. For example, *AR 735-5* provides that an individual who has been recommended for liability has the right to legal advice.[21] Failure to provide legal advice may deprive process that is required by regulation.

Alternately, many administrative errors—such as failing to set out the individual's full name, social security number, date of rank and basic pay at the time of the loss in the recommendation for liability—do not apply to process. In completing your legal review, you properly could conclude that a survey containing this type of deficiency was "legally sufficient." Additionally, you would indicate that the survey contained an administrative error that must be corrected before the survey is processed further. You also would state that the survey need not be resubmitted for legal review after the error is corrected.

[21] AR 735-5, *supra* note 1, para. 13-34b(2).

Summary

By becoming an active participant in the survey process, the administrative law officer will achieve better results. Fewer "not legally sufficient" surveys will be submitted and time will be saved. Following this article is "A Guide for the Report of Survey Officer" which the author used successfully while at Fort Lewis, Washington. The guide has been modified so that it may be reproduced for use in the field.

A GUIDE FOR THE
REPORT OF SURVEY OFFICER

PREPARED
BY
ADMINISTRATIVE AND CIVIL LAW DIVISION
THE JUDGE ADVOCATE GENERAL'S SCHOOL
UNITED STATES ARMY
1993

OFFICE OF THE STAFF JUDGE ADVOCATE
YOUR UNIT
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A Guide for the Report of Survey Officer

1. *Purpose.* This guide is intended to assist you in conducting a timely, thorough, and legally sufficient survey. It is based on the 31 January 1992 edition of Army Regulation 735-5, *Property Accountability: Policies and Procedures for Property Accountability* (*AR 735-5*), found in the *Unit Supply Update 13* (*Update 13*). *Army Regulation 735-5* is your principal reference. When using this guide, check to see if *Update 13* is current. If not, any later changes to the regulation must be followed. The administrative law officer also is available to brief you prior to and during your investigation. You are encouraged to seek legal advice at all stages of your investigation.

2. *What is your mission?* You investigate the loss, damage, or destruction of government property. Your objective is to both determine the cause of the loss, damage, or destruction and to assess responsibility. Your investigation is a fact-finding mission. Once you collect the facts, you draw conclusions. These conclusions are your findings. Based on these findings, you make recommendations. Your chain of command will act on your recommendations.

3. *How do you start your investigation?* You usually will be appointed by your battalion or squadron commander and will be provided with a copy of *DA Form 4697, "Report of Survey."* The front half of the form already will be completed. This form will provide you with basic information on what property was lost, damaged, or destroyed and some general information on how the property was lost, damaged, or destroyed. Read the form—and any attached exhibits—and promptly start your investigation. In conducting the investigation, strive to answer five basic questions: "what," "when," "where," "why," and "who." In other words, make sure you answer the following questions:

a. What was lost, damaged, or destroyed?;

b. When was it lost, damaged, or destroyed?;

c. Where was it lost, damaged, or destroyed?;

d. Why was it lost, damaged, or destroyed?; and

e. Who was responsible for the loss, damage, or destruction?

In attempting to answer these questions, you must collect evidence. Begin by interviewing those individuals who logically are connected to the lost, damaged, or destroyed property. These may be the individuals who are identified in block 11, *DA Form 4697.* If the circumstances surrounding the loss, damage, or destruction are vague, begin your investigation with the property's hand receipt holder. It may be necessary to interview subhand receipt holders and other individuals who used the property. These interviews often will reveal other individuals who must be interviewed to answer the "what," "when," "where," "why," and "who" of the loss, damage, or destruction.

Record the substance of these interviews on *DA Form 2823, "Sworn Statement."* As a survey officer, you are authorized to administer oaths. When *DA Form 2823* is not available, use plain bond or ruled paper. Type or legibly print the word "CERTIFICATE" across the top of the plain bond or ruled paper. Either form of statement must be dated and signed by the individual making the statement. Finally, the statement should be lettered alphabetically as an exhibit, followed by "R/S," the date of the survey, the amount of the survey, and the organization initiating the survey. For further guidance on preparing either *DA Form 2823* or a "Certificate," see *AR 735-5,* paragraph 13-31g.

4. *Determining "what" was lost, damaged, or destroyed.*

a. Your first mission is to determine what was lost, damaged, or destroyed. Usually this task will be straightforward—that is, all you need to do is examine the front side of *DA Form 4697,* and the property that was lost, damaged, or destroyed will be apparent. It then will be an easy task to collect documents that establish loss, damage, or destruction. For example, you can obtain a copy of the hand receipt that shows that property was issued and now is lost. With damaged or destroyed property, you usually can examine the property, obtain police reports, and obtain estimated or actual costs for the damage or destruction. You then will have answered the "what" question and will be prepared to support your answer with exhibits.

b. If the survey involves *damaged* property, paragraph 13-31c, *AR 735-5,* directs you to examine the property immediately. You then must release the property for repair or turn-in. If an expert opinion would be helpful to determining the cause of the damage, ensure that technical inspectors examine the property and give an opinion on the probable cause of the damage.

c. With *lost* property, answering the "what" question may be more complex. You also must resolve the question of "was anything lost?" You may find that the property never was issued. For example, when dealing with lost components from major end items, determine how the loss was identified. Was the property identified, for example, by using a new edition of a manual? If it was, determine whether the property had been issued and accounted for using a prior edition of the manual. The old edition may have had a less-inclusive list of required components and the missing property may really not be missing because it never was issued. Obviously, if the property never was issued, no loss has occurred and the survey should be cancelled. Similarly, when dealing with losses from major end items, determining if shortage annexes have been prepared is important. If a shortage annex exists, the property may have never been present in the unit. The date that the shortage annex was prepared is critical. If the shortage annex is recent, the property probably was lost recently. If it is old, the property may never have been present. Remember, if the property never was present, no loss has occurred. For further guidance, see *AR 735-5,* paragraph 13-30d.

d. You always must *attempt to locate lost property.* The nature of the search will depend on the type of property lost and the "why" and "where" of its loss. For example, if night vision goggles were lost on a field training exercise (FTX), check with other units that were on the FTX and see if they have them. If accountability for property—such as linen—was lost, you may be required to conduct a thorough inventory of linen in the unit. On the other hand, if you are certain that the property fell off the back of a truck at the National Training Center (NTC), you can do little to locate the property (determine, however, whether a search was conducted at the NTC).

5. *What to do if property is recovered during the survey.* During the course of the investigation, you may find the property that had been reported missing. Paragraph 14-16, *AR 735-5,* provides detailed guidance on the steps that must be followed to reestablish accountability. These steps are summarized as follows:

a. If *all property* listed on the report *is recovered,* report the find to the S4 or to the approving authority. Once the

recovery of the property is verified, your job is done. The approving authority will direct that the steps required by paragraph 14-16 are taken to close out the survey.

b. *If some,* but not all, of the *property is recovered,* you will continue to look into the cause of the loss for the remaining property. Paragraph 14-16a(4) provides that the approving authority will direct the individual who initiated the survey to amend his or her file copy of the report by lining out the entries that correspond to the recovered property and reduce the dollar totals shown on the report by the value of the recovered property. The S4 generally is authorized to act for the approving authority.

6. *Determining "when" the property was lost, damaged, or destroyed.* Often, when the loss occurred is clear. You need only confirm the accuracy of the information in block 11 of *DA Form 4697.* In other cases—such as when an inventory determined property to be missing—determining "when" the loss occurred may be difficult, or even impossible. You only may be able to determine "why" the loss occurred and "who" was responsible. For example, you may conclude that because the property was left unsecured, it was lost through theft at an indeterminate time or that it was issued at an indeterminate time without a hand receipt, and that this caused a loss of accountability.

If determining accurately "when" the loss occurred is not possible, attempt to determine when the property was accounted for last. Resolving when the property was last accounted for will assist you in determining the "who" and the "why" questions of the loss. If you are unable to pinpoint the "when" of the loss, you still may be able to make a legally sufficient recommendation for financial liability. You need only conclude that the property was lost because of negligence—the "why" question—on the part of a specific individual—the "who" question.

7. *Determining "where" the loss or damage occurred.* This is usually the easiest question to answer because this requires merely verifying the details found in block 11, *DA Form 4697.* When you have difficulty determining the place of loss an accountability problem is often the reason for the loss. For example, an individual may have signed for the property and subsequently issued it, but failed to obtain a subhand receipt.

If you cannot determine to whom the property was issued, the individual who last was responsible for it may be liable. The basis for a recommendation of liability would be a loss of accountability. For example, individual *A* issued the property to an unknown individual and the property now is missing. Individual *A* is liable because of his or her failure to maintain accountability for the property. On the other hand, if the investigation clearly reveals that individual *A* issued the now-missing property to *B*—without obtaining a subhand receipt—*A* should *not* be held liable. Even though a subhand receipt was not obtained, accountability for the property was not lost when the property was issued to *B.* Because the property clearly was issued to *B, A*'s negligence in issuing the property without a hand receipt, did not cause the loss (for further guidance, see the discussion below on proximate cause). The investigation must focus on *B*'s conduct.

8. *Determining "why" the loss or damage occurred.*

a. Determining the reason for the loss is the critical purpose of a report of survey. In some cases, the determination may be straightforward. For example, block 11, *DA Form 4697* may indicate, "I, CPT Hard Rock, make the following statement: My vehicle was damaged when PVT Bad News intentionally launched and struck it with a TOW missile." To answer the "why" question, all you need to do is to verify these facts, support them with exhibits, and discuss the loss or damage in the narrative portion of the report of survey.

b. In other cases, explaining the "why" of the loss or damage may be more difficult. For example, block 11, *DA Form 4697,* may indicate, "I, CPT Hard Rock, make the following statement: The incoming commander and I conducted a thorough search of the area and the above listed shortages could not be located." How do you attempt to answer the "why" question in a case like this? The following guidance will assist you in answering this question:

(1) Start with what you know. Property described in block 7, *DA Form 4697,* has been determined to be missing. Therefore, the "what" question has been answered partially. As discussed in the "what" section, you still must verify that the property really is missing.

(2) Next, determine who was responsible for the property. This involves learning to whom the property was issued. To answer this, you must obtain a copy of the basic hand receipt. The copy should be preserved as an exhibit.

(3) Once you determine to whom the property was issued, determine what happened to the property. For example, examine the following:

(a) Where was it stored? If it was not secured properly, the "why" of the loss may have been theft.

(b) Was it issued without a hand receipt? If so, the "why" of the loss may have been loss of accountability.

(4) If it was subhand receipted or given to an identified individual, you must attempt to resolve the questions discussed above in b(3)(a) and b(3)(b), as they pertain to that individual. Your goal is to determine who was the last person identified as responsible for the property, and then determine "why" the property is missing.

9. *Determining "who" was responsible for the loss or damage.* If you are able to answer the "what," "when," "where,"

and "why" of the loss or damage, you usually will have answered the "who" question. Answering the "who" question simply is a conclusion—based on your investigation and assessment of the evidence collected—of who caused the "what," "when," "where," and "why" of the loss, damage, or destruction. If answering these questions is not possible, you may not be able to answer the question of "who."

10. *Completing the Report.*

a. *Findings.* Once you have completed the investigation and believe you are prepared to answer the "what," "when," "where," "why," and "who" questions, begin to draft your findings. Paragraph 13-32, *AR 735-5,* requires you to state the facts in your own words and to make your findings complete, so that the reviewer easily can see the basis for liability without returning to the report of survey for more information.

(1) At this stage, you are encouraged to go over your findings with the administrative law officer. When writing findings, *start with a conclusion.* Block 26 contains language that makes starting with a conclusion easy. The preprinted language states, "I have examined all available evidence as shown in exhibits ___thru___ and as indicated below have personally investigated the same and it is in my belief that the articles listed hereon and/or attached to sheets, total cost $ _____." You should continue this preprinted language by writing:

(a) was/were (lost, damaged, or destroyed) through the (simple, gross negligence) of _____; or

(b) was/were (lost, damaged, or destroyed) by the willful misconduct of _____; or

(c) was/were (lost, damaged, or destroyed) as the result of (an unavoidable accident, an unpreventable theft, undeterminable circumstances, etc.).

(2) By stating a conclusion, you have answered the "what" question; you have told the reviewer that the property listed in block 7 was lost, damaged, or destroyed. Go on to "state in your own words, how the loss, damage, or destruction occurred." In so doing, explain the "when," "where," "why," and "who" of the loss by writing:

(a) "When" it was lost, damaged, or destroyed;

(b) "Where" it was lost, damaged, or destroyed;

(c) "Why" it was lost, damaged, or destroyed; and

(d) "Who" was responsible for the loss, damage, or destruction.

(3) Whenever possible, reference your findings to exhibits, so that the reviewer may see the basis for your findings. In writing findings, your goal is to explain, in narrative format, the cause of the loss, damage, or destruction. *Your narrative must support the conclusion with which you started your findings.* If the survey contains contradictory evidence, or if you relied on self-serving statements from the individual who was responsible for the property, you must explain how you resolved the contradiction or what other evidence confirms the self-serving statement. For further guidance, see *AR 735-5,* paragraph 13-32.

(4) A reviewer should be able to read the findings and to see clearly that certain property was lost, damaged, or destroyed in a certain manner, at a certain place or time, and by a certain individual. At its most basic, the reviewer should be able to see that "Individual *A* was negligent (explain how the person was negligent) on 9 Aug. 199X, at _____, and that individual *A*'s negligence caused the loss or damage." If you cannot answer any of the "what," "when," "where," "why," and "who" questions, explain that in your findings.

(5) You also must set out—blocks 26 through 27c—the current Army master data file (or equivalent) value and, if depreciation was allowed (or some other valuation method used), its value after depreciation. If uneconomically repairable property was surveyed, you must explain its disposition or recommended disposition.

b. *Recommendations.* Immediately after making findings, you must make recommendations. Start this section with the word "recommendations." Two general types of recommendations can be made. These are "relief from responsibility and accountability" or "financial liability." They also must indicate whether the survey lists property for which a claim may be processed under *AR 27-20.* For further guidance, see *AR 735-5,* paragraph 13-32c.

(1) *Relief from responsibility and accountability.* If you are unable to determine the cause of, or responsibility for, the loss, damage, or destruction, you should recommend that all parties be relieved of accountability and responsibility. You should make a similar recommendation if you determine that neither negligence nor willful misconduct was involved.

(2) *Financial Liability.* If you conclude that an individual's *negligence or willful misconduct* caused the loss or damage, *you must make a recommendation for financial liability.* Start a recommendation for financial liability by giving the individual's full name, social security number, basic pay (for DOD civilians, 1/12 of his or her annual pay) at the time of the loss, and the date that the individual is expected to terminate his or her service or employment. You also must state clearly the amount of liability (see discussion, below, on amount of liability).

(a) *Willful Misconduct.* Willful misconduct involves an intentional act, specifically aimed at damaging or losing the property. For example, if PVT Schmedlap became angry and blew up his commander's office with a claymore mine, he would have committed an act of willful misconduct. He intended to destroy both the commander's office and its contents. Similarly, if PVT Schmedlap stole the commander's HMMWV and sold it to a used car dealer, he would have committed an act of willful misconduct—because he intended to deprive the government of the use of the vehicle.

(b) *Simple Negligence.* The regulation defines simple negligence as "the failure to act as a reasonably prudent person would have acted under similar circumstances" (see "Consolidated Glossary," *AR 735-5*). Paragraph 13-30b(2), *AR 735-5*, cites several factors to be considered in determining whether negligence is involved. These definitions, however, are cumbersome and legalistic. They may be simplified as follows:

(i) *Simple Negligence Defined.* Was an unreasonable act committed—or in some cases unreasonably omitted—and did that unreasonable act cause the loss. To be unreasonable, the evidence must show that another individual, of similar experience and relationship to the property, as a matter of common sense, would have acted differently. For guidance on the various types of property responsibility, see *AR 735-5*, paragraph 13-30a.

(ii) *Proximate Cause.* If you can show that another individual, of similar experience and relationship to the property, as a matter of common sense, would have acted differently, you have established negligence. To hold someone liable, however, you also must *establish* that the *negligence caused*—referred to as proximate cause in *AR 735-5*—*the loss*. Causation best may be explained by the following examples.

Example 1. Specialist Careless leaves a set of night vision goggles unattended on the unlocked seat of his HMMWV (in downtown Seattle). The goggles are stolen. Specialist Careless's negligence caused the loss. By placing the goggles in a location where theft was reasonably foreseeable, he created the conditions that allowed the loss by theft to occur. In other words, SPC Careless's negligence *proximately caused* the resulting loss.

Example 2. Same facts as example 1, and First Sergeant (1SG) Out O. Luck recovers the goggles, but subsequently manages to lose them. Specialist Careless is off the hook. Although he was negligent, his negligence did not cause the loss. The goggles were returned to the control of the Army when 1SG Out O. Luck recovered them. Specialist Careless cannot be held responsible for the actions of 1SG Luck. Of course, if the findings support it, 1SG Luck may be recommended for liability.

Example 3. Private (PVT) Foyt is driving his 2 1/2 ton truck at sixty-five miles-per-hour, down a forty-five degree hill, on a dirt road at the NTC in Fort Irwin, California. He fails to negotiate a sharp turn at the bottom of the hill and the truck crashes and burns. If the survey officer concludes that PVT Foyt was negligent—driving too fast for the conditions—Foyt's negligence logically caused the accident. If PVT Foyt had not been driving too fast, the accident would not have happened. By driving too fast, PVT Foyt's negligence *proximately caused* the loss.

Example 4. Corporal Crash is driving his 2 1/2 ton at fifty miles per hour through the housing area—a fifteen-mile-per-hour zone). A limb on an old pine tree breaks, falls, and shatters his windshield. Here, even though Corporal Crash was negligent (driving too fast) his negligence did not cause the accident. The tree limb would have fallen anyway. Corporal Crash's speeding did not hasten the tree limb's fall. That he was driving at the wrong time, in the wrong place was pure chance. If, for example, he had left the motor pool a few minutes earlier, but had not been speeding, the damage still could have resulted. Even though he was driving too fast, Corporal Crash's speeding did *not proximately cause* the damage.

Example 5. Staff Sergeant (SSG) Supply negligently issued property without obtaining hand receipts. The property cannot be located, nor can you determine to whom the property was issued. SSG Supply's negligence

caused the loss. The property cannot be located because no accountability documents exist indicating to whom the property was issued. By failing to properly obtain hand receipts for the now-missing property, and because you cannot determine to whom he issued the property, SSG Supply's negligence proximately caused the loss.

(c) *Negligence Presumed.* In some cases, you may not be able to determine the actual cause of the loss. Nonetheless, you still may be able to conclude that a certain individual is responsible for the loss. This is done by "presuming negligence." You may presume negligence when you find that an individual had exclusive access and control over property, and you also can rule out all other causes for the loss.

Example 1. Private Fleet Foot goes absent with out leave. His TA-50 immediately is secured and inventoried, and most of it is missing. Because PVT Foot had exclusive control over his TA-50, and it immediately was secured and inventoried, he may be presumed to have been the cause of its loss. If, however, the property was neither secured, nor inventoried for several months, the presumption may not apply. You must rule out theft or pilferage.

Example 2. Private Broken Up is injured at the NTC and evacuated to the hospital. His TA-50 was lost. Because another explanation for the loss may exist, negligence may not be presumed. For example, the equipment may not have been secured by the chain of command after PVT Broken Up was evacuated to the hospital. Unless you can show that Broken Up already had lost the equipment or that someone else was at fault, recommend that no one be held liable for the loss.

Example 3. Supply Sergeant Dense Head has exclusive control over the supply room and the property therein (he has the only key). All linen was accounted for when he signed for the supply room. Three months later, an inventory determines that thirty percent of the linen is missing. No signs of theft can be found. Because Dense Head had exclusive control of the supply room and other causes of loss have been ruled out, SSG Dense Head may be presumed to have caused the loss.

(d) *Gross Negligence and Damage to Family Housing.* When family housing has been damaged, you must determine whether gross negligence was involved. Whereas negligence essentially is failing to use common sense, gross negligence primarily is failing to use any sense at all. If PVT I.B. Hungry started boiling grease to make french fries, forgot about it, and the kitchen caught on fire, he would have committed an act of simple negligence. Someone else making french fries, using common sense, would have known not to leave the grease unattended. On the other hand, if PVT Hungry dug a barbecue pit in his living room, filled it with charcoal, doused it with five gallons of gasoline and threw on a match, thereby vaporizing his living room, he would have committed an act of gross negligence. Any adult, using any degree of sense at all, would have known better. Note that paragraph 13-32c, *AR 735-5*, provides that occupants are responsible for the conduct in their quarters of members of their household, guests, and pets.

(3) *How much liability.*

(a) *General Rule.* An individual's liability usually will be limited to his or her monthly basic pay (for soldiers) or 1/12 of his or her annual pay (for civilians) at the time of the loss or the actual loss to the government, whichever is less. When *two or more surveys* have been initiated *for the same incident, AR 735-5*, paragraph 13-42, provides that liability still is limited to one month's basic pay. Additionally, when two or more surveys arise out of the same incident, the surveys must be cross-referenced to each other. If you know that your survey is related to another survey on the same individual, ensure that this cross-reference is made. For additional guidance, see paragraph 13-3, *AR 735-5.*

(b) *Exceptions.* Paragraph 13-42, *AR 735-5*, provides that when personal arms or equipment or public funds are involved, liability may be as much as the actual loss to the government. Additionally, if the survey includes a recommendation for liability against an accountable officer, a state, a government contractor or employee, or a nonappropriated fund activity, the recommendation for liability may be for the full amount of the loss. When damage to government quarters or their contents is involved, liability may exceed basic pay if the damage resulted from gross negligence

or willful misconduct. If only simple negligence is involved, liability is limited to one month's basic pay at the time of the loss.

(c) *Actual Loss to the Government—Repairable Property.* For damaged property that can be repaired, the loss to the government is the cost of repairs, or the value of the item at the time of the damage, whichever is less. See Appendix B, paragraph B-1, *AR 735-5.*

—The cost of repair consists of the sum of material, labor, overhead, and transportation, minus any salvage or scrap value of replaced parts.

—If repair makes the item more valuable than it was before the damage, reduce the amount of the repairs by the amount of the increase in value.

—When the actual cost of damage cannot be obtained in a reasonable period of time, an estimated cost of damages (ECOD) may be used. You must state the reason for using an ECOD and the basis on which the estimate was made. For additional guidance, see Appendix B, paragraph B-1b, *AR 735-5.*

(d) *Actual Loss to the Government—Lost or Irreparably Damaged Property.* For lost or irreparably damaged property, *AR 735-5,* Appendix B, paragraph B-2, requires you to determine the actual value of the property at the time of its loss or destruction. The preferred method is an *appraisal.*

Depreciation Method. When an appraisal is not feasible and the property is in less-than-new condition, the *depreciated value* will be used. To compute depreciated value, the survey officer starts with the block 10 value of the property and subtracts the following:

–ten percent for organizational clothing and individual equipment and nonpower handtools;

–twenty-five percent for items constructed of relatively perishable material (with the exception of CTA 50 items) such as leathers, canvas, plastic, and rubber;

–five percent per year of service, to a maximum of fifty percent, for electronic equipment and office furniture.

–five percent per year of service, to a maximum of ninety percent, for tactical and general purpose vehicles;

–See *AR 210-6* for family quarters furniture;

–For all other property, use five percent per year of service, to a maximum of seventy-five percent. If the time of service cannot be determined, use twenty-five percent;

–Appendix B, paragraph B-2(6), *AR 735-5,* permits you to increase or decrease the above rates when you conclude that the property was subjected to more or less use as applicable. *Army Regulation 27-20* may be used as a guide for a fair rate of depreciation.

If the property is new, use the Army master data file price, which is reflected in block 10.

Standard Rebuild Cost. If using an appraisal or the depreciation method is either not possible, or not equitable, you may be able to use the standard rebuild cost to determine loss to the government. You may use this method if the property has been used long enough to warrant overhaul and a standard rebuild cost has been published. When using this method, subtract the standard rebuild cost, offset by any salvage value, from the current Army master data file price. *AR 735-5,* Appendix B, paragraph B-2c.

Salvage Value. When property has been damaged irreparably, give credit for salvage or scrap value, plus the depreciated value of repair parts. For additional guidance, see *AR 735-5,* Appendix B, paragraph B-3.

(4) *Joint liability.* When you conclude that more than one individual is responsible for the loss or damage, you should make a recommendation for joint liability, in accordance with paragraphs 13-32 and 13-42, and table 12-4, *AR 735-5.* Charges are computed as outlined below:

(a) When the actual loss exceeds the combined monthly basic pay for each individual, charge the full amount of each soldier's basic pay, or for civilian employees, the full amount of 1/12 of the annual pay.

(b) When the actual loss is less than the combined basic pay of all individuals, compute the charges in proportion to the soldier's basic pay or, for civilian employees, in proportion to 1/12 of the annual pay.

(c) For example, if two soldiers are jointly liable for an actual loss of $1000, and the basic pay of soldier #1 is $500 and the basic pay of soldier #2 is $1000, each soldier will pay a proportional share. To compute the financial charge for joint and several liability, add the basic pays of the soldiers ($500 plus $1000) for a combined basic pay figure of $1500. Then divide each soldier's monthly basic pay by the combined basic pay figure and multiply this percentage by the

actual loss amount to arrive at each soldier's financial charge. Soldier #1 would owe $333.33 ($500 divided by $1500, multiplied by $1000). Soldier #2 would owe $666.67 ($1000 divided by $1500, multiplied by $1000). For joint liability among civilian employees, use the same formula while substituting 1/12 annual pay for monthly basic pay.

11. *Completing block 27.* The amount of actual loss, not the block 10 value, will be recorded in block 27a. Block 27b is the total amount of recommended liability. Block 27c is the difference between blocks 27a and 27b. For an example, see *AR 735-5,* figure 13-7.

12. *Notifying the individual.* In accordance with paragraph 13-34, *AR 735-5*, if you recommend an individual for financial liability, you must notify that person by memorandum (*AR 735-5*, figure 13-12) and afford the individual a chance to submit matters in rebuttal. See also *AR 735-5,* paragraph 13-35.

a. If the *individual still* is stationed *locally,* blocks 30, 31, and 32 of *DA Form 4697* should be completed. If the individual desires to submit matters in rebuttal, allow him or her the opportunity to speak with a legal assistance attorney. You may speed the process by making the legal assistance appointment for an individual who desires to speak with an attorney. If the individual submits matters in rebuttal, you must both consider them and note your consideration of them in the report. If the individual indicated that he or she wanted to submit a statement, but, after seven days, has not, explain the individual's omission in block 26 of the survey and forward the report.

b. If the *individual no longer is stationed locally,* you must send him or her a copy of the survey and the notification memorandum (*AR 735-5*, figure 13-12) by either certified or registered mail. A copy of the memorandum and the certified or registered mail receipt must be attached to the file. Individuals located in the continental United States will be given fifteen days from the date of mailing to respond. Individuals stationed outside of the continental United States will be given thirty days to respond. If you receive a response, you must consider it and note your consideration of it in your report. If the individual does not respond, annotate the file accordingly.

c. When a *soldier* is *dropped from the rolls*, the notification memorandum (*AR 735-5*, figure 13-12) and copy of survey should be sent, by certified or registered mail, to the soldier's home of record. The memorandum and certified or registered mail receipt must be attached to the file. Because the soldier likely will not respond, you may write, in block 26, "The survey and notification memorandum were sent to the soldier's home of record _____ 199X, the soldier has been dropped from the rolls and no response is expected." The survey then may be completed without additional delay.

13. *Completing the Survey.* After accomplishing the above, you should ensure that the survey is administratively complete. All blanks should be filled. To ensure completeness, go over the survey by using the appendix to this "Guide." Prior to submitting your survey, you should review it with the administrative law officer.

Check List for Reviewing Reports of Survey

1. _____ Are all blocks on the front side of *DA Form 4697* filled out properly (*AR 735-5*, figure 13-3)?

2. _____ Are blocks 21-32b completed (*AR 735-5*, figure 13-7)?

3. Does block 26 contain the following:

   _____ a. A conclusion of negligence, willful misconduct, gross negligence (which must be considered if family housing/quarters are involved), or no fault ("Guide" para. 10a(1))?

   _____ b. Findings of fact, in the survey officer's own words (supported by referenced exhibits) that show the bases for the survey officer's conclusions (*AR 735-5*, para. 13-32a; "Guide" para. 10a)?

   _____ c. If contradictory evidence exists, a statement of how the contradiction was resolved (*AR 735-5,* paras. 13-31f, 13-32a(2); "Guide" para. 10a(3))?

   _____ d. If the survey officer relied on a self-serving statement from the person responsible for the property, an explanation of how that statement is confirmed by other evidence (*AR 735-5,* paras. 13-31e, 13-32a(1); "Guide" para. 10a(3))?

   _____ e. If uneconomically repairable property was involved, a statement of how it was disposed of or a statement recommending disposition (*AR 735-5*, para. 13-32c; "Guide" para. 10a(5))?

   _____ f. The new and depreciated (if applicable) value of the lost, damaged, or destroyed property (*AR 735-5*, appendix B; "Guide" paras. 10a(5), 10b(3))?

_____ g. A recommendation of either pecuniary liability or relief from liability. If liability is recommended, the soldier's name, SSN, monthly base pay at the time of the loss, ETS date, and the amount of liability (*AR 735-5*, para. 13-32c(6); "Guide" para. 10b)?

4. _____ If property was recovered during the survey, have the steps required by *AR 735-5*, para. 14-16 ("Guide" para. 5) been taken?

5. _____ If the survey is related to another report of survey, has it been cross-referenced appropriately to the other report of survey (*AR 735-5*, para. 13-3; "Guide" para. 10b(3))?

6. _____ If joint liability is recommended, was it properly computed (*AR 735-5*, para. 13-32, para. 13-42, table 12-4; "Guide" para. 10b(4))?

7. Does block 27 contain the following:

_____ a. Block 27a—the actual loss (depreciated, if applicable) (*AR 735-5*, figure 13-7)?

_____ b. Block 27b—the actual loss (depreciated if applicable) or one month's basic pay, whichever is less—unless one of the exceptions allowing greater liability apply (*AR 735-5*, para. 13-42; "Guide" para. 10b(3)(b))?

_____ c. Block 27c—the difference (if any) between block 27a and 27b?

8. _____ Did the survey officer date block 28, type his or her name in block 29a, and sign block 29b?

9. _____ Have all soldiers recommended for liability been notified by memoranda and checked block 30 and signed block 32b (*AR 735-5*, para. 13-34, figure 13-7, figure 13-12; "Guide" para. 12)?

_____ a. Is a copy of the memorandum attached (*AR 735-5*, para. 13-34; "Guide" para. 12)?

_____ b. If the soldier is unavailable for personal service of the memorandum of notification, was the memorandum mailed by certified or registered mail? If so, is a copy of the memorandum and certified mail receipt included with the survey (*AR 735-5*, para. 13-35; "Guide" para. 12)?

10. _____ If a rebuttal statement was not received, has the time period mandated by *AR 735-5*, para. 13-35 ("Guide" para. 12) elapsed or did the soldier elect not to submit matters? In either case, does the survey reflect this?

11. _____ If a rebuttal statement was received, does the survey indicate that the survey officer considered it (*AR 735-5*, paras. 13-35b(5), 13-35b(7); "Guide" para. 12)?

12. _____ If the survey was the subject of a legal review, were all comments complied with?

USALSA Report

United States Army Legal Services Agency

Examination and New Trials Division Notes

Include Any Approved Reprimand in the Action

Occasionally, a case received for appellate review under Uniform Code of Military Justice article 69(a)[1] indicates that the convening authority apparently meant to approve and order into execution an adjudged reprimand, but failed to include the reprimand as part of the signed action. A reprimand—if approved—must be issued in writing.[2] If ordered executed, the reprimand must be included in the convening authority's action.[3] The reprimand then should be set forth verbatim in the promulgating order.[4]

[1] UCMJ art. 69(a) (1988).

[2] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1003(b)(1) (1984) [hereinafter MCM].

[3] *Id.* R.C.M. 1107(f)(4)(G).

[4] *See generally id.* R.C.M. 1114(c)(1).

In a case in which a reprimand ostensibly is approved—but is not contained in the action—this office generally will return the case to the convening authority for a corrected action.[5] The clarification or correction of an ambiguous action frequently is personal in nature and may require the direct involvement of the convening authority who took the initial action in the case—even if that individual no longer is in command.[6] Prior to publication of the action or official notification to the accused and transmittal of the record for appellate review, the convening authority may recall and modify his or her action to include the imposition of an approved reprimand.[7] The teaching point is that any reprimand adjudged by a court-martial and approved by the convening authority must be set forth explicitly in the action and in the resulting promulgating order. Captain Kee.

Judge Advocate's Review of Certain Courts-Martial Under the Provisions of R.C.M. 1112

A judge advocate must review each general and special court-martial in which the accused withdrew or waived appellate review; each special court-martial in which the approved sentence did not include a bad-conduct discharge; and each summary court-martial.[8] The review must include the judge advocate's conclusions about the court-martial's jurisdiction over the accused and the offense, the legal sufficiency of the charges and specifications, the legality of the sentence, and a response to each of the accused's written allegations of error.[9] The Rules for Court-Martial clearly contemplate that this review will take place after the convening authority's action.[10]

If the reviewing judge advocate recommends corrective action, he or she must forward the case to the officer exercising general court-martial convening authority over the accused at the time the court-martial was held.[11] That recommendation should state clearly the basis for the corrective action, the appropriate action that should be taken, and an opinion as to whether corrective action is required as a matter of law.[12] The officer exercising general court-martial convening authority is not required to follow the reviewing judge advocate's recommendation. If the reviewing officer recommends corrective action that—in the reviewer's opinion—is required as a matter of law, and the officer exercising general court-martial convening authority fails to take corrective action at least as favorable to the accused as that recommended by the reviewing judge advocate, the case must be forwarded for further review by The Judge Advocate General.[13] The Rule for Courts-Martial 1112 review process is fundamentally important to the legality and finality[14] of findings of guilty and sentences of the courts-martial enumerated above. Captain Kee.

The Advocate for Military Defense Counsel

DAD Notes

Willfully Suffering the Loss or Damage of Military Property

"Willfully Suffering the Loss or Damage of Military Property"[15] sounds like an intentional tort, but is an apparently seldom-charged property offense with little case history. A recent court-martial revisited the offense and the standard that the government must meet. In *United States v. Haverberg*,[16] the accused was charged with willfully disposing of military property, but he pleaded guilty to willfully suffering the loss of military property.

Willfully suffering the loss or damage of military property requires proof of the following elements: (1) certain property

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[5] *See id.* R.C.M. 1107(g).

[6] United States v. Loft, 10 M.J. 266 (C.M.A. 1981); United States v. Lower, 10 M.J. 263 (C.M.A. 1981).

[7] MCM, *supra* note 2, R.C.M. 1107(f)(2).

[8] *Id.* R.C.M. 1112(a); UCMJ art. 64(a) (1988).

[9] MCM, *supra* note 2, R.C.M. 1112(d).

[10] *See id.* R.C.M. 1112(a)(2); R.C.M. 1112(e)(2); R.C.M. 1106(a) (expressly requiring a recommendation from the staff judge advocate "[b]efore the convening authority takes action . . . .").

[11] *Id.* R.C.M. 1112(e).

[12] *Id.* R.C.M. 1112(d)(3).

[13] *Id.* R.C.M. 1112(g)(1); *see also id.* R.C.M. 1201(b)(2).

[14] *Id.* R.C.M. 1209(a)(2); UCMJ art. 76 (1988).

[15] UCMJ art. 108 (1988).

[16] CM 9201469 (A.C.M.R. 6 Oct. 1992) (unpub.).

was lost, damaged, sold, or wrongfully disposed of; (2) the property was military property of the United States; (3) the loss, damage, destruction, sale, or wrongful disposition was suffered by the accused, without proper authority, through a certain omission of duty by that accused; (4) the omission was willful or negligent; and (5) the property was of a certain value or the damage was of a certain amount.[17] *United States v. Bender*[18] was an early attempt to define willful suffering the loss or damage of military property, and addressed appropriate situations that would invoke this offense. The explanation appearing in the *Manual for Courts-Martial* adopts many of the definitions in *Bender* and provides the following:

> "To suffer" means to allow or permit. The willful or negligent sufferance specified by this article includes: deliberate violation or intentional disregard of some specific law, regulation, or order; reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; or loaning it to a person, known to be irresponsible, by whom it is damaged.[19]

United States v. O'Hara[20] further explains the elements. In that case, O'Hara, an airman in the United States Navy, willfully pushed a gas turbine compressor over the ship's side and was found guilty of willfully suffering military property to be lost. On review, the Navy Board had to decide whether the evidence failed to establish that O'Hara had a duty to safeguard the property. In upholding the conviction, the Board stated that "no specific or special duty need be proved since no one in the service may willfully or intentionally damage military property without authority."[21]

In light of the lack of any leading cases on this issue, however, the *O'Hara* dissent defined the following essential elements that should be proved beyond a reasonable doubt: (1) that the accused was under a duty to secure or preserve certain described property; (2) that he failed to perform that duty; (3) that such failure was willful; (4) that such failure resulted in the loss of the property; (5) that the loss was without proper authority; and (6) that the property was military property of the United States. The dissent then elaborated as follows:

> For the accused to be guilty of willful loss of military property . . . his act must have been an intentional act and it must have been committed for the purpose of creating the loss. The accused must have knowledge of the probable consequences of his act and commit the act with an intent that such consequences ensue. There is apparently no requirement that the accused be under any duty concerning the military property involved. He may intentionally occasion the loss of military property over which he has no control and in which he has no official interest.
>
> On the other hand, authorities indicate that one cannot "suffer" an offense to be committed unless he has a duty to prevent it and an opportunity to perform that duty. Where an accused is under a duty toward certain military property, knows that the loss of such property is imminent or actually going on, and willfully refrains from taking measures to prevent it, he is guilty of willfully suffering such loss. Willful sufferance may be based upon a deliberate violation or positive disregard of some specific provision of law, regulation or orders, or upon a duty assumed by the accused by virtue of his taking control of the property.[22]

In *Haverberg*, the accused pleaded guilty to wrongful appropriation of a set of night vision goggles (NVGs) when he was detailed to "range support." He experimented with them and—because they appealed to his love of science fiction—he

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[17] UCMJ art. 108 (1988); MCM, *supra* note 2, pt. IV, para. 32(b)(3).

[18] 4 C.M.R. 750 (A.F.B.R. 1952).

[19] MCM, *supra* note 2, pt. IV, para. 32(c)(2).

[20] 34 C.M.R. 721 (N.C.M. 1964).

[21] *Id.* at 724. Based on the willful and intentional nature of O'Hara's offense, the Board found no reason to inquire whether a special duty toward the military property existed. The Board, nevertheless, found that O'Hara had a special duty based on his relationship to the property.

> He was engaged in his official and regularly assigned duty in cleaning the hangar deck . . . and certainly this included a duty not to willfully push overboard any of the property in the area. Further some other form of special duty to refrain from willfully losing the compressor undoubtedly arose when the accused voluntarily took control of the compressor and started to move it in connection with his particular assigned task; i.e. his "field day" duties on the hanger deck.

Id.

[22] *Id.* at 727-28. The dissent disagreed with the latter scenario, which has been adopted by MCM and the existing case law.

used a set as part of a costume for a science fiction convention. He was not authorized to take the NVGs, and hid them as the unit moved back into garrison following the range support exercise. The next morning, the NVGs were discovered missing, and extensive procedures—including a "health and welfare" inspection and lock-down—were employed to locate them. The accused became aware of the search for the NVGs, and, in fear of being caught, passed them on to a member of a different company. The accused specifically asked for his friend's assistance in returning the NVGs because he thought the friend was reliable and knowledgeable enough with the Army "system" to be able to return the device without anyone getting into trouble. Unknown to the accused, the friend passed the NVGs to yet another soldier, who apparently disposed of the NVGs outside of military control to some unknown destination.

The record failed to disclose whether or not the accused was under a duty to secure or preserve the NVGs. Assuming arguendo, that his wrongful appropriation of the property created such a duty, the record failed to disclose any evidence to show that the accused's failure to perform that duty was willful. The accused indicated that, although he intentionally gave the NVGs to his friend, he thought the friend would return the NVGs to the company inventory. At trial, the parties wrestled with whether the loss was due to the accused's willful omission or the accused's neglect. The military judge concluded that, because the accused willfully and improperly gave the NVGs to his friend—knowing that friend to have been unreliable at times—the accused must suffer the consequences of the loss. Because the improper, willful transfer led to the property loss, the accused was found guilty of willfully suffering the loss of military property.

The *Haverberg* record reveals substantial confusion over the "willful suffering" offense and over whether that offense was the appropriate one to charge under the circumstances. Counsel are cautioned that for the government to meet its burden of proving that the accused had a duty to preserve the property, it must go beyond merely showing that the accused was somehow responsible for the property merely because he or she is a service member. Furthermore, the government likely will have difficulty proving that the accused intentionally disposed of property in a situation similar to *Haverberg*. Determining whether the accused used the property in the course of his or her normal duties, and that the accused willfully disregarded his or her duty to the property can lead to situational confusion. Counsel should be aware of the different elements associated with the three Uniform Code of Military Justice article 108 offenses[23] and the corresponding theories behind each offense. If the government proceeds under a "willful suffering" theory, the dearth of case law on that offense leaves the "omission of duty" and "willful" elements open to interpretation. Defense counsel should review closely the facts in each case with this in mind because a client's providency ultimately may rest on these fine-line descriptions. Captain Becker.

Clerk of Court Notes

Nature of Offenses Reviewed by the United States Army Court of Military Review

In fiscal year (FY) 1992, cases that came before the United States Army Court of Military Review (ACMR) resulted in the review of 6212 findings of guilty—a decrease of less than five percent from the number of specifications reviewed in FY 1991.

Bad check specifications under Articles 123a and 134—together with forgery offenses—again led the list of offenses reviewed, with 1419 specifications. The group of offenses consisting of common-law larceny—including wrongful appropriation, obtaining services by false pretenses, and receiving stolen property—came in second, with 1141 specifications reviewed—down twenty-one percent from the previous year. Not included in this category were offenses against Army property proscribed by Article 108, which underwent only a slight decline.

The ACMR reviewed 709 specifications of drug offenses, which came in third place, and also were down twenty-one percent from FY 1991. Alternatively, absenteeism—absent without leave, desertion, and missing movement—with 511 specifications reviewed, and crimes against military order—disrespect to, disobeying, or assaulting officers or noncommissioned officers—with 259 specifications, increased thirty-two percent over the previous year. Undoubtedly, these shifts represent Desert Storm-related cases coming to issue in the appellate system. This trend becomes evident in the number of specifications reviewed by the ACMR involving desertions with intent to avoid hazardous service (forty-four), malingering (five), and self-inflicted injury convictions (seven).

Although assault, battery, and maiming cases—with 272 specifications—saw little change, the number of sex offenses involving adults—261 specifications—increased by eighteen percent. The number of assault offenses against children—232 specifications reviewed—declined 8.6%.

The number of burglary, housebreaking, and unlawful entry cases (134) and robberies (fifty-nine) declined from FY 1991, while the number of homicides (forty-six) reviewed by the ACMR was substantially unchanged. The ACMR also reviewed two espionage specifications, which equalled the number of convictions for abusing a public animal.

The Clerk of Court is experimenting with using the Army Court-Martial Management Information System as one aid to

[23] The other, more common UCMJ article 108 offenses are (1) wrongful sale or disposition of military property, and (2) willful or negligent damage, destruction, or loss of military property. *See* MCM, *supra* note 2, pt. IV, para. 32(a)(1),(2).

assess whether cases reaching the ACMR—although perhaps becoming fewer in number—are becoming more complex. The statistics between the two years surveyed, FY 1991 and 1992, supports our hypothesis that sex crimes—except those involving children—increased, while certain other crimes also known to present difficult issues of fact and law—for example, homicides and other personal violence—remained the same. These figures represent an increasing portion of a diminished caseload.

The caseload has diminished significantly from FY 1990. In FY 1990, the impact of Operations Desert Shield and Desert Storm began to be felt—1903 cases, 8588 specifications were reviewed (compared to the 1381 cases and 6212 specifications that were reviewed in FY 92). The differences between FY 1991 (1526 cases, 6521 specifications) and 1992 are seen more in the nature of the caseloads, rather than in the overall totals.

Other factors, however, affect the difficulty of an appellate caseload. Guilty pleas, developments in the law coming from higher courts, the quality of performances by the trial participants (including staff judge advocates and their chiefs of military justice), and the numbers and quality of appellate counsel each impact on the workload of an intermediate appellate court.

The categories of offenses mentioned above—such as absenteeism, crimes against military order, drug offenses, and sex offenses—are the traditional offenses reflecting the caliber of service members at any given time. Another category that simply might be called *crimen falsi* crimes includes specifications of false official statements, false testimony, false claims, false swearing, use of a false pass, impersonation, obstructing justice, customs violations, and other forms of dishonesty. Collectively, with 332 findings of guilty reviewed on appeal in FY 1992, this grouping ranks fifth in the number of convictions reviewed by the ACMR. The good news is that this represents a twenty percent decrease from the number reviewed the year before. Mr. Fulton.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Notes

"I Examined It With My Fingers": Immediate Recognition Is Key in "Plain Feel" Cases According to the United States Supreme Court

In *Minnesota v. Dickerson*,[1] the United States Supreme Court unanimously held that the "plain view" exception to the Fourth Amendment's warrant requirement allows the seizure of contraband detected by "plain feel." A majority of the Court, however, held that the "feel" of the officer who conducted the search in this particular case was not quite plain enough.

Nevertheless, *Dickerson* remains a useful guide in determining the validity of any plain-feel seizure. The Court has established a subjective test for determining whether a felt object is discovered in the course of authorized touching during a legitimate search or by excessive tactile exploration. This test turns on whether the object's identity is "immediately apparent" to the searcher. The Supreme Court previously had applied an "immediately apparent" test to plain-view cases,[2] but the test's application to the sense of touch probably will be less restrictive of police activity.

In *Dickerson*, the police did a *Terry*[3] pat-down search of the suspect, Dickerson, who had just left a "notorious 'crack house'" and who had behaved evasively after seeing police officers. While conducting the pat-down, one of the officers discovered "a small lump" in the suspect's pocket. "I examined it with my fingers," the officer testified at trial, "and it slid and felt to be a lump of crack cocaine in cellophane."[4] When the policeman took it from the suspect's pocket, he saw

[1] United States v. Dickerson, No. 91-2019, 1993 U.S. LEXIS 4018, at *1 (June 7, 1993).

[2] *See* Soldal v. Cook County, Illinois, 113 S. Ct. 538 (1993); Horton v. California, 496 U.S. 128 (1990); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion).

[3] Terry v. Ohio, 392 U.S. 1 (1968). *Terry* "stop and frisks" are based on "reasonable suspicion," not probable cause.

[4] *Dickerson*, 1993 U.S. LEXIS 408, at *6.

that it was crack cocaine, and seized it. This seizure led to the trial and conviction of Dickerson.

A six-member majority of the Court,[5] in a decision written by Justice White, found the digital examination to be fatal to the crack cocaine's admissibility as evidence. Just as evidence discovered in plain view is admissible only if the officer is lawfully in a position to view it, evidence discovered by plain touch is admissible only if the officer is legally in a position to feel it. By continuing to feel an unknown object obviously too small to be a weapon, the officer went beyond the touching permitted by a *Terry* stop and frisk. Once the item has been excluded as the original object of the search, the officer may not search it further unless probable cause exists to believe that it is contraband or evidence of a crime.

Justice White wrote, however, that "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass make its identity *immediately apparent,* there has been no invasion of the suspect's privacy beyond that already authorized . . . ."[6] Immediacy of recognition is critical. The majority opinion borrows this concept from *Arizona v. Hicks*.[7] In that case, stolen stereo equipment was excluded from evidence because the serial numbers identifying it were discovered only when police—who legitimately had entered an apartment without a warrant—moved the equipment around to read the numbers.[8]

> The subsequent seizure of the equipment could not be justified by the plain-view doctrine, this Court explained, because the incriminating character of the stereo equipment was not *immediately apparent*; rather, probable cause to believe that the equipment was stolen arose only as a result of a further search—the moving of the equipment—that was not authorized by the [sic] search warrant or by any exception to the warrant requirement. The facts of this case are very similar. Although the officer was lawfully in a position to feel the lump in respondent's pocket, because *Terry* entitled him to place his hands upon respondent's jacket, the court below determined that the incriminating character of the object was not *immediately apparent* to him. Rather, the officer determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or by any other exception to the warrant requirement. Because this further search of respondent's pocket was constitutionally invalid, the seizure of the cocaine that followed was likewise unconstitutional.[9]

Circuit courts that earlier recognized a plain-touch or plain-feel corollary to the plain-view doctrine—usually in container cases—sometimes have appeared to use the "immediately apparent" test to determine whether an item was discovered in the course of an authorized search.[10] *United States v. Williams*,[11] for example, held that a police officer who lawfully had handled a paper bag filled with small packets of illegal drugs was justified in opening it without a warrant because, by his sense of touch, "its contents were *already apparent* to . . . the officer."[12] Like the Supreme Court in *Dickerson,* the *Williams* court cautioned that

> the doctrine would not sanction any use of the sense of touch beyond that justified by the initial contact with the container. For example, an officer who satisfies himself while conducting a *Terry* check that no weapon is present in a container is not free to continue to manipulate it in an attempt to discern the contents.[13]

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[5] Justice Scalia, though joining the Court's opinion in *Dickerson*, wrote that he did not approve of the reasoning in *Terry*, but he refrained from saying that its result was wrong.

[6] *Dickerson*, 1993 U.S. LEXIS 4018, at *18 (emphasis added).

[7] 480 U.S. 321 (1987).

[8] In her dissent from *Hicks*, Justice O'Connor wrote that, as "mere inspection of a suspicious item" already in plain view, the moving of the equipment did not require probable cause. *Id.* at 335. She reversed herself by joining the majority in *Dickerson.*

[9] *Dickerson*, 1993 U.S. LEXIS 4018, at *23 (citation omitted, emphasis added).

[10] At the very least, plain-touch or plain-feel cases tend to recognize the immediacy of the searcher's discovery. *See* United States v. Russell, 655 F.2d 1262, 1264 (D.C. Cir. 1981) (officer "unavoidably" felt the outline of a gun in a paper bag); United States v. Ocampo, 650 F.2d 421, 429 (2d Cir. 1981) (Drug Enforcement Agency agent was able "readily to identify" bagged bundles of wrapped currency that were "easily discernible" by lawful touch); United States v. Portillo, 633 F.2d 1313, 1315 (9th Cir. 1980) (officer "immediately" felt an object he "knew" to be a gun).

[11] 822 F.2d 1174 (D.C. Cir. 1987).

[12] *Id.* at 1181 (emphasis added).

[13] *Id.* at 1184.

Similarly, in *United States v. Salazar*,[14] a Drug Enforcement Agency (DEA) agent who discovered contraband in the course of a *Terry* search gave the following testimony: "[The suspect was wearing] a bulky coat. I squeezed the outside of the pocket and I felt what appeared to be a plastic—I heard and felt the crackling of plastic. I had a pretty good-sized handful of this item. . . . At that point I believed it was crack cocaine."[15] The *Salazar* court decided "Once the permissible pat-down [for weapons] reasonably caused the agents to believe that there were crack vials in his pockets, they had probable cause to search his pockets."[16] Presumably, the DEA agent was authorized to "squeeze" the pocket of a bulky coat to determine if a weapon were hidden therein. This clearly would not be the case with a "nylon jacket"[17] as was worn by the suspect in *Dickerson*.

Comparing *Salazar* with *Dickerson* illustrates that the "immediately apparent" test used in future plain feel cases is likely to be highly subjective. The subjectivity presumably will depend on the law enforcement official's perceptions. Only the officer knows for certain that a lump in the suspect's pocket was examined because either the officer (1) had probable cause to believe that it was crack; or (2) the officer had probable cause to believe that it was crack because he or she digitally examined it.[18] Consequently, a fair reading of *Dickerson* leads to the following conclusion: had the officer conducting the pat-down simply said, "Aha! Crack!" and reached into the suspect's pocket, the Court likely would have been forced to conclude that the crack's identity was "immediately apparent."

The long-term result of *Dickerson* may be to make a law enforcement officer supernaturally confident of his or her guesses about what lies hidden beneath suspects' clothing—although a searcher's recognition of a felt object presumably will be required to have at least some grounding in reality.

Dickerson, while not significantly limiting police activity, should facilitate the majority's wish to avoid "the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will."[19] Mr. Baker, Summer Intern.

How and When Is Nonperformance of Duty a Crime? The COMA Provides Guidance in *United States v. Lawson* and *United States v. Tanksley*

Introduction

The Court of Military Appeals (COMA) recently clarified two elements of the crime of dereliction of duty.[20] In *United States v. Lawson*,[21] the COMA held that simple negligence is the standard against which an officer or enlisted member is to be judged for nonperformance and, in *dicta*, faulty performance of duty. In *United States v. Tanksley*,[22] the COMA unequivocally ruled that the government must prove that a service member accused of dereliction of duty was assigned the duties he or she either allegedly nonperformed or malperformed. Both cases simplify the dereliction of duty principles. The *Lawson* and *Tanksley* cases also provide the military practitioner with clear guidance for analyzing the criminality of duty-related conduct.

Historical Background of the Law

The third element of article 92(3), Uniform Code of Military Justice (UCMJ), makes dereliction of duty a criminal offense. The *Manual for Courts-Martial* explains that conviction requires proof that the accused performed duties in a derelict manner by neglect or culpable inefficiency.[23] Negligent dereliction results from nonperformance of duties. Dereliction by culpable inefficiency results from deficient performance.[24] In *United States v. Lawson,* the COMA found

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[14] 945 F.2d 47 (2d Cir. 1991).

[15] *Id.* at 48.

[16] *Id.* at 51.

[17] *Dickerson*, 1993 U.S. LEXIS 4018, at *6.

[18] In a partial dissent, Chief Justice Rehnquist, joined by Justices Blackmun and Thomas, criticized the majority for accepting the Minnesota Supreme Court's finding on this question because the trial court had not addressed it. Additionally, the dissenters would have remanded the case to the state supreme court because its findings had been based on reasoning different than that of the United States Supreme Court—that is, touch, as a "less reliable" and "more intrusive" means of perception than sight, should not be covered by the plain-view doctrine. Minnesota v. Dickerson, 481 N.W.2d 840, 845 (1992).

[19] *Dickerson*, 1993 U.S. LEXIS 4018, at *23, *citing* Texas v. Brown, 460 U.S. 730 (1983).

[20] UCMJ art. 92(3) (1988).

[21] 36 M.J. 415 (C.M.A. 1993).

[22] 36 M.J. 428 (C.M.A. 1993).

[23] MANUAL FOR COURTS-MARTIAL, United States, pt. IV, para. 16b(3)(c) (1984) [hereinafter MCM].

[24] *Id.* para. 16c(3)(c).

the roots of the present article 92(3) in old naval law and precedent.[25] The COMA cited to General Snedeker, and his *Military Justice Under the Uniform Code.* This treatise explains that negligent nonperformance is the omission to perform a duty caused either by negligent conduct in relation to a known duty or by the negligent failure to know how to do a duty one is required to perform.[26] Snedeker's treatise cites failing to fill the gasoline tank of an airplane or vehicle headed into combat, failing to check the daily fuel report of a vessel at sea, and failing to read a memo on a bulletin board that imposes a duty on an individual—when that individual knows that he or she is required to examine the bulletin board—as examples of negligent nonperformance.[27]

According to Snedeker, however, culpable inefficiency is the "inexcusably faulty performance" of a known duty.[28] He characterized culpable inefficiency as conduct deserving of blame or censure for lack of power or energy sufficient for the desired effect.[29] To distinguish culpable deficiency from nonperformance, Snedeker noted that if a task requiring a number of component parts is performed, but one or some are not—and this omitted performance results in an overall deficient or incomplete performance—then the crime is malperformance even though no evidence of nonperformance exists.[30] For example, a mission to safeguard and transport records is performed with culpable inefficiency when one of the records is lost. A complete failure to transport the records, however, is nonperformance.[31] General Snedeker's text summarizes as follows:

> The fault may consist in taking wrong measures, or in performing right measures in an inefficient manner, or in omitting certain details in the performance of a general duty. The omission of a certain detail, if known to the pleader and if of a type which can be particularly described, can be the basis of a specification alleging negligent nonperformance; but if the detail, as distinguished from the consequences of its omission, is unknown to the pleader, of if a lengthy performance is spotted with minor omissions of detail, the offense . . . may[be] . . . culpable inefficiency.[32]

Snedeker commented that an individual is not liable for any dereliction of duty when he or she lacks the ability and opportunity to perform duties properly. Consequently, duties that exceed official and technical qualifications, or physical abilities, cannot expose an individual performing them to criminal liability.[33] A commissioned officer "must be deemed a responsible person and held responsible for the proper and efficient performance of duties commensurate with his [or her] grade as required by law, he [or she] cannot be expected to perform efficiently the duties of a higher grade in which he [or she] has had no training or experience."[34]

Article 92(3) includes these same standards for dereliction of duty by nonperformance and malperformance. The *Manual for Courts-Martial* defines negligence as an act or omission by a person under a duty to use due care, but who exhibits a lack of the degree of care which a reasonably prudent person would have exercised under the same or similar circumstances. Culpable inefficiency is defined as inefficiency for which no reasonable excuse exists.[35]

The Case of United States v. Lawson

The COMA earlier addressed culpable inefficiency in *United States v. Dellarosa.*[36] In *dicta,* it stated that the simple negli-

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[25] J. SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE § 2905 (1953).

[26] *Id.* at 260.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 621.

[30] *Id.* at 620.

[31] *Id.*

[32] *Id.* at 620.

[33] *Id.*

[34] *Id.* at 622.

[35] MCM, *supra* note 23, pt. IV, para. 16c(3)(c). The 1984 *Manual for Courts-Martial* flatly rejects Snedeker's position that only *gross* negligence—consisting of reckless or indifferent conduct—could be the standard for nonperformance of duty. Rather, the standard is "simple negligence." *See* United States v. Lawson, 36 M.J. 415, 421 (C.M.A. 1993). Colonel Winthrop's review of General Article 62, American Articles of War 1874, notes a number of negligent acts committed by officers and enlisted members requiring no more than simple negligence—such as, neglect in observing standing post orders, and neglect by a noncommissioned officer in not disciplining a soldier under his or her authority who destroyed civilian property. According to Winthrop, only a few acts required a higher standard—such as, inexcusable neglect by a chaplain to perform funeral services, and culpable neglect of the sick by a surgeon. W. WINTHROP, MILITARY LAW AND PRECEDENTS 726-33 (2d ed. 1920 reprint).

[36] 30 M.J. 255 (C.M.A. 1990).

gence standard for nonperformance was equally applicable in faulty performance cases, because a blurring between the two theories of dereliction has evolved in military practice.[37] *Lawson* reaffirms this view, while adding that the simple negligence standard for malperformance applies only when culpable inefficiency itself is not alleged.[38] Dereliction of duty by malperformance no longer need be alleged in terms of culpable inefficiency.

Lawson establishes that only one negligence standard—simple negligence—applies in nonperformance cases, and by inference to malperformance cases when culpable inefficiency is not alleged. The accused, Lieutenant Lawson, was a Marine officer. During a field exercise in desert terrain, he was tasked by his battalion commander to post road guides in pairs at four checkpoints along a preselected route for the organization's night-time motor march. He also was to make a roster of the names of those who were serving as road guides and their position points. Finally, the accused was tasked with providing the list to his superior movement coordinator before the posting of personnel began. From the outset, the accused had difficulty in completing the assigned task. He failed to secure the required number of personnel to execute the task, instead substituting chemical light sticks at one checkpoint. The accused also was late in beginning the mission, which contributed to a sense of urgency to get the job done. Having already mishandled two elements of the mission, the accused then made the fatal mistake of getting lost. Unsure of his position, the accused left one pair of road guides in the desert without any further instructions. Shortly thereafter, the accused found the correct route and left one road guide at the correct checkpoint. The accused then proceeded to finish the posting. Unfortunately, neither the accused, nor his superior officer—who was unaware of the misplaced guide—took any steps to recover the guide once the march was completed. The forgotten Marine died from exposure and was found two days later.[39]

The COMA affirmed Lawson's conviction for dereliction of duty under the standard of negligent nonperformance of duty. The accused's failure to post the guides in pairs, as well as his failure to assemble the roster and give it to his superior, supported the conviction. The court rejected Lawson's argument that dereliction by nonperformance committed by officers should be judged under the more exacting standard of gross and culpable negligence when making decisions in a tactical environment. In particular, the accused urged that "use of a reasonable person standard in assessing professional judgment[s] under unforeseen circumstances, ignores the reality of decision making in today's military."[40] The COMA, however, held that an officer accused of dereliction is judged on a simple negligence standard for nonperformance.[41] Moreover, the COMA stressed that, had the accused been charged with an overall failure to successfully complete the mission without alleging culpable inefficiency—that is, had he been accused of malperformance—the same standard would apply. In sum, the COMA found nothing in the language of article 92(3) to support the accused's position.[42] Even had the court agreed with the accused, in all likelihood Lawson would have been found guilty of gross negligence.[43] The trail of blunders committed by the accused certainly meets the criteria, especially because the COMA determined that the tasks assigned to Lieutenant Lawson were simple and were understood by him.[44]

The accused also tried equating the gross and culpable standard used to judge his poor decisions with the standard used in evaluating a trial attorney for effective representation of a criminal client. The COMA rejected this analogy. It stressed that a lawyer's performance is not reviewed under a charge of dereliction of duty during a criminal proceeding. Rather, according to the COMA, a lawyer is judged by end results. A line officer like the accused, however, is evaluated on nonperformance or malperformance regardless of the result. In this regard, a lawyer has a constitutionally protected independence in making tactical decisions denied to the line officer.[45] The line officer's conduct will be judged under the reasonable man standard, taking into consideration the nature and complexity of the duty and all the circumstances of the case.[46] Snedeker's *Military Justice Under the Uniform Code* asserts that an officer is assumed to be responsible and efficiently able to perform the duties expected of his or her rank.

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[37] *Id.* at 259; *see also* Milhizer, *Dereliction of Duty and Weather Reports,* ARMY LAW., Oct. 1990, at 41.

[38] *Lawson,* 36 M.J. at 419 n.2.

[39] 33 M.J. 946, 953-58 (N.M.C.M.R. 1991).

[40] *Lawson,* 36 M.J. at 422.

[41] *Id.*

[42] *Id.*

[43] Snedeker stated that failure to exercise great care in situations of special danger or peril that require great care would constitute gross negligence. SNEDEKER, *supra* note 25, at 621.

[44] *Lawson,* 36 M.J. at 423.

[45] *Id.* at 421.

[46] *Id.* at 422.

In sum, *Lawson* affirms the principle that simple negligence determines when an officer or enlisted member is derelict in the nonperformance of duties.

The Case of United States v. Tanksley

In *Tanksley,* the COMA examined whether an accused convicted of willful nonperformance of duty actually had the assigned duty. The accused, a noncommissioned officer named Tanksley, was an active duty Reservist. He was tasked with the duties of a communications and electronics maintenance officer. During the course of performing these duties, he irregularly procured chemical light sticks and bayonets, which led to his conviction for willful nonperformance.

On appeal, the issue presented was whether the accused ever was assigned a duty to acquire these materials. Testimony at trial established his responsibility for ordering electronic related equipment.[47] No evidence, however, was presented to show that the accused had a duty to acquire anything else. The COMA concluded, "When a service member is tried for dereliction of duty, the existence of the duty must be demonstrated by the evidence. Demonstrating a certain duty is not too difficult."[48] Because the evidence was lacking, the COMA reversed Tanksley's conviction.

The *Manual for Courts-Martial* discloses numerous sources of duty: treaty, statute, regulation, lawful order, standard operating procedure, and custom of service.[49] When a trial counsel is faced with a factual situation similar to *Tanksley,* he or she must find a duty from one of these sources and prove it by competent evidence.

Conclusion

After *Lawson*, the simple negligence standard of proof clearly applies to prosecutions for nonperformance or malperformance of duty and is the only standard used to judge failures in the duty performance of officer and enlisted personnel. Trial counsel, however, should be wary of alleging culpable inefficiency as a basis for criminal liability because a higher negligence standard may apply. Finally, *Tanksley* demonstrates that, to prosecute a willful nonperformance of duty case successfully, the government must show proof at trial that an accused had a duty to perform a particular act or task. Major Ackerman.

Sparing the Rod: The Parental Discipline Defense In the Military[50]

Introduction

Military law recognizes that under certain circumstances, parents are justified in using physical force to discipline their children.[51] In other words, "conduct which otherwise meet[s] the elements of proof of assault, including spanking of children, [is] justified by . . . [a] parental duty to administer discipline."[52] While the military courts have addressed the "parental discipline defense" in only a few reported decisions, those cases are very useful in defining the parameters of the defense. In addition, a recent COMA case, *United States v. Robertson,*[53] reiterates the requirements for using the parental discipline defense and provides additional guidance on what prosecution evidence is necessary to defeat it.

The Parental Discipline Defense Generally

The parental discipline defense is a type of justification defense. Justification defenses are affirmative defenses that vindicate certain acts when those acts are done in the performance of a legal duty.[54] Even though justification defenses come in many forms, all of them share the following internal structure: (1) triggering conditions, plus the response requirements of (2) necessity and (3) proportionality.[55]

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[47] 36 M.J. 429 (C.M.A. 1993).

[48] *Id.* at 430.

[49] MCM, *supra* note 23, pt. IV, para. 16c(3)(a).

[50] [The parental discipline defense] is firmly recognized in the law . . . as the right of the parent to discipline his [or her] minor child by means of moderate chastisement. The right to correct an adopted child is the same as the right of a natural parent in this regard, and this authority has been extended even to one who has taken a child into his [or her] home to be brought up as a member of the family without formal adoption. Similarly a guardian may lawfully administer moderate chastisement for the correction of his ward.

ROLLIN M. PERKINS & ROLAND N. BOYCE, CRIMINAL LAW 1106 (3d ed. 1982).

[51] One of the earliest reported military cases discussing the parental discipline defense involved a father charged with the unpremeditated murder of his six-year-old adopted daughter. United States v. Moore, 31 C.M.R. 282 (C.M.A. 1962).

[52] United States v. Robertson, 36 M.J. 190, 191 (C.M.A. 1992).

[53] *Id.*

[54] Some of the more common justification defenses are self-defense, defense of others, defense of property, and the lesser evils defense. *See generally* 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 121-49 (1984).

[55] *Id.* at 2.

A triggering condition must occur before a defendant will be able to act under a claim of justification. For example, "in defensive force situations the justification is triggered if an aggressor presents a threat of unjustified harm to a protected interest," such as by attempting to strike the defendant.[56]

The defendant's response to this triggering condition does not give rise to the defense automatically. The response also must satisfy the following two requirements: (1) it must be *necessary* to protect or further the interest at stake, and (2) it must cause only a harm that is *proportional* or reasonable in relation to the harm threatened or the interest to be furthered.[57]

The necessity requirement requires that the defendant "act only when and to the extent necessary to protect or further the interest at stake."[58] For example, if an individual is advised that he or she will be assaulted at some time in the future, that person is not justified in immediately using defensive force. Nor would he or she be allowed to use force greater than that which is necessary to prevent the impending harm.

The requirement for proportionality places a limit on the amount of harm that may be caused in protecting or furthering a protected interest. It bars a justification defense "when the harm caused by the actor may be necessary to protect or further the interest at stake, but is too severe in relation to the value of that interest."[59] As a result, some states do not allow the use of deadly force to protect property on the theory that the value of all human life—even the life of a wrongdoer—is more valuable than property.

Most American jurisdictions recognize some form of justification defense arising from the parental or benevolent custodial authority.[60] The structure of the defense follows the general pattern set out above. "There arises a need for conduct that promotes or safeguards the welfare of the minor or incompetent" (triggering mechanism), and in response the defendant engages in conduct, constituting the offense, "(a) when and to the extent necessary to promote or safeguard the welfare of the minor or incompetent, (b) that is reasonable in relation to the gravity of the harm or evil threatened and the importance of the interest to be furthered."[61]

The Parental Discipline Defense in the Military

Military "law has clearly recognized the right of a parent to discipline a minor child by means of minor punishment."[62] In so doing, the COMA has adopted the Model Penal Code standard for the parental discipline defense.[63] Under the Model Penal Code, a parental figure or guardian may use physical force against a child under the following circumstances:

> (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation[64]

As the rule and the drafters' comments to the Model Penal Code indicate, the parental discipline defense has several components. First, the actor claiming the defense must be the parent or guardian of the minor child, or a person similarly responsible for the child's general care or supervision.[65] Second, the parental figure must have a legitimate purpose in physically disciplining the child.[66] Finally, the parental figure must use moderate force when disciplining the child.[67] A good illustration of how the military applies the Model Penal Code standard is *United States v. Brown*.[68] Brown had punished his seven-year-old stepson for stealing a quarter by beat-

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[56] *Id.*

[57] *Id.* at 4.

[58] *Id.*

[59] *Id.* at 5.

[60] *Id.* at 161.

[61] *Id.* at 162.

[62] United States v. Scofield, 33 M.J. 857, 860 (A.C.M.R. 1991).

[63] United States v. Brown, 26 M.J. 148 (C.M.A.), *review denied*, 27 M.J. 18 (C.M.A. 1988).

[64] MODEL PENAL CODE § 3.08(1) (Am. Law Inst. 1985).

[65] *See* United States v. Proctor, 34 M.J. 549 (A.C.M.R. 1992). In *Proctor*, the accused spanked a 13-year-old girl who was not his daughter (apparently as part of a deviate sexual act) and attempted to justify the act by claiming he was acting *in loco parentis* to the child.

[66] MODEL PENAL CODE § 3.08 cmt. 2 (Am. Law Inst. 1985).

[67] *Id.*

[68] 26 M.J. 148 (C.M.A. 1988).

ing him with a belt. The three or four blows from the belt resulted in welts and severe bruising. The trial court found the accused guilty *inter alia* of assault and the Army Court of Military Review (ACMR) affirmed. On appeal to the COMA, the accused argued the evidence was insufficient—as a matter of law—to prove his guilt. He further argued that the force used against his stepson was justified by his duty to administer discipline as a stepparent.

Applying the Model Penal Code standard, the COMA determined the evidence was legally sufficient to establish the accused's failure to satisfy the requirements of the parental discipline defense. The COMA ruled that a reasonable factfinder could have determined that the accused had an improper purpose for his actions because he disliked his stepson, had previously displayed hostility toward him, and was angry when the assault occurred. The court also held that a reasonable factfinder could have determined the accused had not used "reasonable" force. The COMA considered the severity of the punishment, the numerous blows, and the physical reactions from each blow to be sufficient evidence of unreasonable conduct.

Interestingly, the COMA "read in" a requirement that the use of force be "reasonable" even though the Model Penal Code does not require it expressly. The Model Penal Code standard for the parental discipline defense simply requires that a person not "culpably" create a "substantial risk of the excessive injuries specified in" the rule.[69] The drafters' comments refer to conduct not reaching the level of excessive force as "moderate" force. The *Brown* opinon's addition of a reasonableness requirement, however, does not change the Model Penal Code formulation for the parental discipline defense significantly because the application of moderate force for a proper purpose would be reasonable conduct.[70]

The COMA's guidance in *Brown* is extremely limited. The COMA adopted the Model Penal Code standard, but provided little guidance on how to apply the standard. Consequently, practitioners looking for cases applying the Model Penal Code standard for the parental discipline defense should look at two cases from the ACMR.

In *United States v. Scofield*,[71] the accused disciplined his eight-year-old son for coming home late from school and he disciplined his seven-year-old daughter for stealing earrings from a babysitter and then lying about the theft. He spanked each child on the legs and buttocks with a leather belt and the children sustained bruises from the spanking. At trial, the accused pleaded guilty to two specifications of assault consummated by battery. On appeal, the ACMR applied the Model Penal Code standard and set aside the findings and sentence.

The ACMR held that the military judge erred in finding that the accused had used unlawful force and that he should have reopened the providence inquiry to resolve conflicting sentencing evidence on the unlawful nature of the punishment. The ACMR held that the evidence during the presentencing proceedings contradicted the accused's admissions during the providence inquiry that his conduct was excessive. For example, the presentencing evidence established that the accused acted based on parental concern. Furthermore, the pediatrician who treated the accused's daughter would not state affirmatively that the daughter's bruises were serious. Photographs and other evidence admitted during the presentencing phase of the trial established the presence of bruises. The court, however, found evidence that the accused's conduct was unintentional and that he acted with a proper parental motive. Therefore, the ACMR determined that the trial judge should have reopened the providence inquiry. The ACMR stated that the Model Penal Code standard and case law allow parental conduct that causes bruising on a child's buttocks and legs when the parent had a proper parental purpose and the bruises were unintended.

In addition, the ACMR determined that the prosecution's photographs of the child's bruises did not establish excessive force per se. The ACMR did not lay down a blanket rule that photographs never could establish excessive force; rather, the ACMR simply considered the injuries in the photographs before the court. The ACMR left open the possibility that photographs depicting more egregious injuries could establish excessive force.

In contrast to the photographs, the ACMR did assert that, without more, the mere use of a leather belt does not establish excessive force because a leather belt "is not *per se* a force designed to cause or known to create a substantial risk of excessive injury."[72] Therefore, the ACMR considered the nature of the specific implement used to administer punishment.

In *United States v. Gowadia*,[73] the ACMR also considered the nature of the implement used. The ACMR determined that use of a web belt from a military uniform was not excessive force when the metal buckle was removed. The ACMR not only considered the implement used, but also considered how the implement was used. Because the accused had struck

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[69] *Id.*

[70] *Id.*

[71] 33 M.J. 857 (A.C.M.R. 1991).

[72] *Id.* at 862.

[73] 34 M.J. 714 (A.C.M.R. 1992).

his twelve-year-old stepson only on the legs and not a sensitive area of the body, and because the resulting injuries were minor, the ACMR found that the accused's actions were not excessive and were justified. The ACMR, however, did determine that binding the hands and feet of the stepson and placing a plastic bag over his head was excessive force. Expert testimony from a military psychiatrist about the physical and psychological effects supported the excessive force determination.

The COMA recently revisited the parental discipline defense in *United States v. Robertson*.[74] In *Robertson*, the accused spanked his seven-year-old daughter on the buttocks with a belt. He did so because she had gotten out of bed during her nap, had rummaged through her mother's things, and had wasted some perfume. The accused was convicted of assault on a child under the age of sixteen. His conviction and sentence were affirmed by the ACMR.

On appeal to the COMA, the accused argued that the evidence was insufficient to support a finding of guilty. The COMA again applied the Model Penal Code standard to determine whether the evidence could support a finding of unreasonable conduct. The ACMR first considered whether the accused had a proper motive for punishing his daughter, determining that the accused did have a proper punishment purpose.

Next, the COMA considered whether the accused used reasonable force. Consistent with the ACMR's decisions in *Scofield* and *Gowadia*, the COMA held that neither the photographs detailing the extent of the bruising, nor the use of a belt established excessive force per se. In so ruling, the COMA considered the child's age and size, and the severity of the injuries. The COMA, however, found other proof of unreasonable conduct such as evidence that the daughter's injuries caused her great pain and prevented her from sitting down at school. A pediatrician who had treated the child also provided expert testimony that the bruises resulted from hard blows. Therefore, the COMA went beyond the ACMR's cases by articulating what evidence successfully will rebut the parental discipline defense when neither the photographs of injuries, nor the implement used to administer punishment, establish excessive force.

Conclusion

The parental discipline defense is a viable defense in military law. Consequently, practitioners need to understand the scope of the defense and be prepared to use and rebut it in appropriate cases. For example, the cases demonstrate that trial counsel probably should not rely solely on photographs of injuries to establish excessive force. Photographs depicting mere bruising simply are not enough to overcome the parental disipline defense. In contrast, expert testimony of the severity of the injuries, or amount of force used, may be particularly useful in establishing excessive force. Additionally, practitioners should also realize that, even though the use of an implement—such as a belt—to administer punishment may not establish excessive force per se, *how* an implement is used will determine whether an accused's conduct was excessive or not. Major Barham.

Speedy Trial: R.C.M. 707(e) Means What It Says—Preserve Speedy Trial Issues Through Conditional Guilty Plea

Most military criminal law practitioners are aware that Change 5 to the *Manual for Courts-Martial*[75] included substantial changes to the rule governing speedy trial—Rule for Courts-Martial (R.C.M.) 707.[76] One of these changes added R.C.M. 707(e), which states, "Except as provided in R.C.M. 910(a)(2),[77] a plea of guilty waives any speedy trial issue as to that offense." Another significant change was a new R.C.M. 707(b)(3)(B), which states, "If the accused is released from pretrial restraint for a significant period, the 120 day period under this rule shall begin on . . . the date of preferral of charges . . . ." The changes to R.C.M. 707 became effective on 6 July 1991.[78]

The recent case of *United States v. Cornelius*,[79] illustrates a pitfall awaiting counsel who fail to understand the significance of the modifications caused by Change 5 in the area of speedy trial.

Sergeant Mark E. Cornelius was serving in Germany in 1991. In May of that year, Cornelius left Germany for an ill-fated trip to the Netherlands. He travelled to Amsterdam, where he bought some marijuana in a bar. He smoked part of the drug, retaining the balance for later distribution in Germany. His plan, however, proved short lived. On his return to Germany, the German border police searched Cornelius and discovered the marijuana. The Germans then arrested Cornelius.[80]

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[74] 36 M.J. 190 (C.M.A. 1992).

[75] MCM, *supra* note 23, Change 5.

[76] *Id.* R.C.M. 707.

[77] *Id.* R.C.M. 910(a)(2) ("With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion").

[78] *Id.*

[79] CM No. 9102565, slip op. (A.C.M.R. 25 May 1993).

[80] *Id.* at 2.

Cornelius returned to his unit the following day, 22 May 1991. His commander restricted Cornelius "under varying conditions" until 30 August.[81] The command preferred several drug-related charges against Cornelius on 12 August. A military judge arraigned Cornelius on 22 October. Trial began on 8 November.[82]

Sergeant Cornelius's pretrial restraint lasted for 101 days. One hundred and fifty-four days passed from the inception of restriction to arraignment.[83] Trial commenced 171 days after Cornelius was restricted. Cornelius's defense counsel believed these facts established a violation of R.C.M. 707, requiring the Government to bring an accused to trial within 120 days of imposition of restraint or the preferral of charges.[84]

The defense counsel apparently relied on the pre-Change 5 version of R.C.M. 707(b)(2). This "old" rule provided, "when no charges are pending—if the accused is released from pretrial restraint for a significant period, the time under this rule shall run only from the date on which charges or restraint are reinstituted."[85] Because charges were preferred against Cornelius before his commander released him from pretrial restraint, defense counsel believed that the government was required to try Cornelius within 120 days of the first day of restriction.

The defense counsel was aware that Change 5 modified R.C.M. 707 and eliminated the condition that no charges be pending at the time of release from restraint for the speedy trial clock to reset.[86] The defense counsel believed, however, that the drafters of the change had misinterpreted case law[87] and that the change was of no consequence. At trial, the defense counsel moved for dismissal of charges, arguing that the time for trial dated from Cornelius's restriction—not from the date of preferral. The defense counsel raised the issue in a standard pretrial motion. The military judge heard argument and denied relief. Cornelius then pleaded guilty and the military judge found him guilty. Unfortunately for Cornelius—pursuant to R.C.M. 707(e)—the plea and findings waived any speedy trial issues he may have had.[88]

On appeal, Cornelius claimed that his defense counsel was ineffective because she had failed to preserve any speedy trial issues by neglecting to enter a conditional guilty plea. The defense counsel answered the allegation in an affidavit.[89] She shared her personal position on the meaning of Change 5. She said that she did not discuss conditional pleas with her client because she believed that she could preserve the speedy trial issue by raising it prior to entering a plea despite the provisions of R.C.M. 707(e). She maintained this position on appeal, asserting in her affidavit that the President of the United States could not "[overturn] years of precedent" by changing the *Manual for Courts-Martial*.[90]

The ACMR said defense counsel was wrong. In so doing, the court cited Article 36[91] of the UCMJ for the proposition that the President may prescribe rules for trial procedure. The

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[81] *Id.*

[82] *Id.*

[83] MCM, *supra*, note 23, R.C.M. 707(b)(1) (provides that arraignment stops the so called "speedy trial clock").

[84] *Id.* R.C.M. 707(a).

[85] *See generally* United States v. Gray, 21 M.J. 1020 (N.M.C.M.R. 1986), *aff'd*, 26 M.J. 16 (1988).

[86] MCM, *supra* note 23, R.C.M. 707(b)(3)(B), provides in full as follows:

> *Release from restraint.* If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of
>
> (i) the date of preferral of charges;
>
> (ii) the date on which restraint under R.C.M. 304(a)(2)-(4) is reimposed; or
>
> (iii) the date of entry on active duty under R.C.M. 204.

[87] The defense counsel believed that the drafters had misinterpreted *United States v. Gray*. Gray was placed in pretrial confinement for an aggravated assault. He was released a month later without charges being preferred. The command preferred charges about a month following Gray's release. Gray was tried beyond 120 days of his original confinement. The courts denied his speedy trial claim by applying the "old" version of R.C.M. 707. Gray's release without charges meant the speedy trial clock was reset to zero and started again at preferral.

[88] United States v. Cornelius, CM No. 9102565, slip op. at 4 (A.C.M.R. 25 May 1993).

[89] *Id.* at 3.

[90] *Id.* at 4.

[91] UCMJ art. 36 (1988). The court also relied on United States v. Merritt, 1 C.M.R. 56 (C.M.A. 1951), one of the earliest cases decided by the COMA. *Merritt* addressed the authority Congress delegated to the President under Article 36. The court also noted that the President may prescribe rules that depart significantly from prior case law. *Id.* (citing United States v. Leonard, 21 M.J. 67 (C.M.A. 1985)).

ACMR said that Change 5 did change procedures. Consequently, the court concluded that the defense counsel had misadvised her client.[92]

The ACMR then examined the ineffective assistance claim, using the well-known *Strickland-Scott*[93] test. The court held that the defense counsel's erroneous advice constituted deficient performance for two reasons. First, she failed to explain to her client that R.C.M. 707(e) and R.C.M. 910(a)(2) provided him with a means to preserve any speedy trial issue and still plead guilty. Second, the defense counsel failed to seek a conditional plea for Cornelius.[94]

The defense counsel's deficiencies did not, however, constitute ineffective assistance of counsel. The ACMR found that the speedy trial clock stopped in accordance with R.C.M. 707(b)(3)(B)[95] when Cornelius was released from restriction. The clock started again at zero when charges were preferred and stopped for good at arraignment. Because Cornelius's speedy trial issue was not viable, defense counsel's failure to preserve the issue did not prejudice his case.[96]

Counsel should draw at least two lessons from the *Cornelius* case. First, personal disagreement with the meaning of the Rules for Court-Martial is a weak basis on which to build a winning case. Zealous advocacy is a professional requirement.[97] Stubborn adherence to an outdated legal standard is a different matter entirely. The President has considerable rule-making authority under Article 36. Counsel must not ignore the text of the rules that the President promulgates, including recent changes.

Secondly, counsel should remember that under R.C.M. 707(e), a guilty plea to an offense on which findings are entered waives further review of any speedy trial issue pertaining to that offense. Nevertheless, R.C.M. 707(e) provides an important exception—a conditional plea pursuant to R.C.M. 910(a)(2).[98] Conditional pleas require government consent and permission from the military judge. If a counsel is successful in obtaining such cooperation, counsel can preserve speedy trial issues and still pursue a guilty plea.

Counsel should avoid the mistakes made by the defense counsel in *Cornelius*. Defense counsel can avoid jeopardizing their clients' cases—as well as insulate themselves from ineffective assistance claims—through careful attention to the Rules for Court-Martial. Major Jacobson.

International Law Notes

Attack on the Iraqi Intelligence Service Headquarters

On 26 June 1993, two United States warships launched twenty-three Tomahawk land attack cruise missiles at the Iraqi Intelligence Service Headquarters in Baghdad, Iraq. Twenty of the missiles struck the intended target, inflicting what Pentagon spokesmen described as significant damage to the building. The remaining three missiles struck a neighboring residential area, killing eight civilians and wounding twelve.[99]

In his letter advising Congress of his action, President Clinton stated that the attack was in response to the Iraqi orchestrated attempt to assassinate former President Bush during his visit to Kuwait in April of 1993.[100] The President ordered the attack following his review of Department of Justice and Central Intelligence Agency investigations which revealed that the Iraqi Intelligence Service directed the assassination attempt. Invoking Article 51 of the United Nations Charter, the President called the cruise missile attack an exercise of the United States "inherent right of self-defense," and cited Iraqi government-sponsored terrorism as a continuing threat to United States nationals. President Clinton went on to say that attempts to resolve the situation without the use of force would be futile, given the Iraqi government's "pattern of disregard for international law." The goal of the attack, according to the President, was to "deter and preempt future unlawful actions on the part of the Government of Iraq."

Ambassador Madeleine K. Albright, Permanent Representative to the United Nations, elaborated on the President's statements in her statement to the United Nations Security

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[92] United States v. Cornelius, CM No. 9102565, slip op. at 4 (A.C.M.R. 25 May 1993).

[93] Strickland v. Washington, 466 U.S. 668 (1984), established a two-pronged test for ineffective assistance of counsel. An accused first must show that his or her counsel's performance was deficient. The accused then must show that the deficiency was prejudicial, resulting in an unfair trial. The COMA adopted the *Strickland* test in United States v. Scott, 24 M.J. 186 (1987).

[94] *Cornelius*, slip op. at 5.

[95] MCM, *supra* note 23, R.C.M. 707(b)(3)(B).

[96] *Cornelius*, slip op. at 6.

[97] *See, e.g.*, DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rules 1.1, 5.4. (1 May 1992).

[98] Speedy trial issues are not the only matters waived by a regular guilty plea. Rule for Courts-Martial 910(j) applies waiver to any issue when an accused has entered a "nonconditional" guilty plea "insofar as the [issue] relates to the factual issue of guilt of the offense(s) to which the plea was made."

[99] John Lancaster & Barton Gellman, *U.S. Calls Baghdad Raid a Qualified Success*, WASH. POST, June 28, 1993, at A-1.

[100] Letter from President William J. Clinton to Thomas E. Foley, Speaker of the House of Representatives (June 28, 1993).

Council.[101] She stated that the attempted attack on a former president constituted a direct attack on the United States. Regarding Iraq's disregard of international law, Ambassador Albright cited Iraq's refusal to obey United Nations Security Council Resolutions 687 and 715 (involving various matters relating to its weapons of mass destruction and ballistic missiles); 688 (involving repression of Kurds and Shiites minorities); and 706 and 712 (involving the sale of oil for humanitarian purposes). An overwhelming majority of Security Council members accepted the United States position on the attack.[102]

This position is consistent with United States policy on the use of force in self-defense. The United States eschews the restrictive interpretation of Articles 2(4) and 51 of the United Nations Charter. Commentators holding this restrictive view maintain that a nation may employ self-defense only if an "armed attack" directed at the nation's territorial integrity and political independence occurs.[103] The United States, however, contends that Article 51 preserves a nation's "inherent" right of self-defense under customary international law.[104] In this context, the Article 51 term "armed attack" reasonably is interpreted to include attacks on United States nationals abroad. For example, "armed attack" would include terrorist attacks directed at United States citizens abroad because of their nationality or to influence United States foreign policy.[105] Such incidents actually are considered direct attacks against the United States.

The failed Iraqi assassination plot constituted this type of armed attack because it was aimed at a former sovereign, and motivated by his official acts. The international community recognizes the serious impact on international relations of attacks or attempted attacks against sovereigns during peacetime. One need consider only Gavrilo Princip's assassination of Archduke Ferdinand and his wife in Sarajevo during an earlier Balkan dispute—an event that ignited World War I—to see the gravity of such an attack. Consequently, the 1973 New York Convention codified the customary international law prohibiting peacetime assassination, and calls on the parties to the convention to criminalize acts against a category of persons defined as "internationally protected persons."[106] Former President Bush, while a guest of the Emir of Kuwait during a three-day visit to commemorate Bush's role in liberating Kuwait, would qualify as an internationally protected person.[107] Furthermore, the plot—which was foiled the day before former President Bush's arrival in Kuwait—appeared to be a realization of the Iraqi government threats made during and after the Gulf War to "hunt down and punish" President Bush for his role in the War. Therefore, both of these factors—the status of President Bush and the rationale behind the attack—indicate that the United States was justified in viewing the plot as an attack on the United States.

The use of force in self-defense also must meet the criteria of necessity and proportionality.[108] The necessity element includes two components: attempts at peaceful redress (mandated by Article 33 of the United Nations Charter) and the immediacy of the danger.[109] The very nature of the activity involved in this case made attempts at peaceful redress unavailing. This was exacerbated by Iraq's recent record of noncompliance with international legal demands. Iraq vehemently denied any involvement in the plot; instead, the Iraqi government asserted that the assassination plot was concocted by the United States and Kuwait to justify further attacks against Iraq.[110] When clandestine activities such as this one are involved, the Iraqi response is predictable. Therefore, attempting to seek redress is difficult when the other party refuses to acknowledge any responsibility. Nevertheless, United States intelligence and law enforcement agencies have clearly linked the plot to the Iraqi Intelligence Service.

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[101] Madeleine K. Albright, Statement on the Iraqi Attempt to Assassinate President Bush, Address Before the United Nations Security Council (June 27, 1993), United States Mission to the United Nations Press Release 110-(93).

[102] Julia Preston, *Security Council Reaction Largely Favorable to Raid,* WASH. POST, June 28, 1993, at A-12.

[103] Louis Henkin, *Use of Force: Law and U.S. Policy, in* RIGHT V. MIGHT 37 (Louis Henkin, ed. 1989).

[104] Abraham D. Sofaer, *Terrorism, the Law, and the National Defense,* 126 MIL. L. REV. 89, 94 (1989).

[105] *Id.* at 96. Oscar Schachter, *The Extra-Territorial Use of Force Against Terrorist Bases,* 11 HOUS. J. INT'L L. 309, 312 (1989).

[106] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 [hereinafter Convention; *see also* Bert Brandenburg, Note, *The Legality of Assassination as an Aspect of Foreign Policy,* 27 VA. J. INT'L L. 655, 661 (1987).

[107] Convention, *supra* note 106, art. 1; *see also* 18 U.S.C. § 1116 (1982). This statute criminalizes the murder or attempted murder of foreign officials and internationally protected persons. Expressly included in the definition of foreign official are former heads of state.

[108] 1 RESTATEMENT OF THE LAW (THIRD), FOREIGN RELATIONS LAW OF THE U.S. 905 (1987).

[109] Major Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986,* 37 NAVAL L. REV. 49 (1988).

[110] Lancaster & Gellman, *supra* note 99, at A-1.

As a result, the United States clearest alternative was to present the matter to the United Nations Security Council pursuant to Article 35 of the United Nations Charter.[111] Recent events, however, revealed the ineffectiveness of this course of action. As Ambassador Albright stated before the Security Council, Iraq's record of compliance with all United Nations Security Council Resolutions has been poor. The Iraqi government has given no reason to indicate that it would abide by any potential sanctions in this case. Furthermore, because of the extent of current economic sanctions against Iraq, any further sanctions not involving the use of force would not have been productive.

The immediacy of the danger posed by Iraqi government-sponsored terrorist acts is, of course, demonstrated by the failed attempt itself. The sophistication and the four-square-block lethal area of the discovered device evidences the intent of the Iraqi Intelligence Service, which Ambassador Albright labelled as the "terrorist infrastructure of the Iraqi regime."[112] Therefore, based on Iraq's capabilities and demonstrated willingness to employ those capabilities, the United States considers Iraqi-sponsored terrorism a continuing threat. In the United States view, self-defense in this situation is undertaken, not only to protect its nationals, but also to deter future attacks.

The cruise missile attack clearly was proportional. The target of the Tomahawk missiles was the headquarters of the agency responsible for planning the assassination plot. While attacks on higher value military targets—including Saddam Hussein—were considered, the target, timing (weekend), and weaponry (precision-guided cruise missiles) indicate that the planners sought to minimize civilian casualties to the maximum extent possible.[113] Moreover, the duty to minimize civilian casualties does not rest solely on the attacking force. In peacetime, a government has an obligation to avoid placing military objectives in densely populated areas.[114] Accordingly, by locating its intelligence headquarters in a residential area, the Iraqi government shares responsibility for the civilian casualties.[115]

The Iraqi government's planned assassination attempt on President Bush represents an extremely egregious example of state-sponsored terrorism. While the United States use of force against Iraq exemplified its traditionally more expansive interpretation of Article 51, that interpretation is, nonetheless, a legally supportable and practical response to this brand of terrorism. Lieutenant Commander Winthrop.

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[111] The Iraqi Ambassador to the United Nations made such an argument before the Security Council, stating that Iraq was not given a "fair hearing." The Security Council, however, rejected his position. Preston, *supra* note 102, at A-12.

[112] Albright, *supra* note 101, at 4.

[113] Lancaster & Gellman, *supra* note 99, at A-1.

[114] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflict (Protocol I), Dec. 12, 1977, art. 58, in 16 I.L.M. 1391; *see also* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al., eds. 1987).

[115] The three errant missiles landed 100 to 500 yards from their targets. Therefore, if the Iraqi government had complied with Article 58 of Protocol I—which the United States considers customary international law—civilian casualties largely would have been avoided. Moreover, this particular building had been attacked during the Gulf War and then rebuilt. Lancaster & Gellman, *supra* note 99, at A-1.

Claims Report

United States Army Claims Service

Affirmative Claims Note

10 U.S.C. § 1095 Now Covers Ancillary Services

Section 1095, Title 10, United States Code (U.S.C.), allows recovered medical care costs to be deposited directly into the operations and maintenance account of the servicing military treatment facility (MTF) so long as the care was provided in the MTF. Recently, questions have arisen as to whether 10 U.S.C. § 1095 applies to costs incurred by MTFs for care provided in civilian institutions.

For example, an active duty soldier or family member is injured in an automobile accident and receives initial treatment at a civilian emergency room before being transferred to an MTF. The civilian facility would be reimbursed either through the Civilian Health and Medical Program of the Uni-

formed Services (CHAMPUS)—for nonactive duty patients—or through a health services command open allotment account—for care provided to an active duty soldier. In neither situation would the civilian facility be reimbursed with funds from the local MTF's operations and maintenance account. Accordingly, 10 U.S.C. § 1095 would *not* apply to the costs of the emergency room care and any money recovered for these costs must be deposited into the General Treasury.

One limited exception exists to the general rule that 10 U.S.C. § 1095 does not apply to costs expended for care provided at a civilian medical facility. Occasionally, patients receiving treatment in an MTF require medical services that the MTF is unable to provide. In such cases, the MTF personnel often refer patients to local civilian sources to obtain the necessary services and the MTF is required to pay for these services out of local operation and maintenance funds. These services are ancillary to primary care, which still are provided and managed by the MTF. For example, a patient being treated for severe fractures to the ribs and legs may require postoperative, physical therapy that the MTF cannot provide. The principal treating physician at the MTF could direct the patient to a civilian facility for the necessary physical therapy, while retaining control over the remainder of the patient's postoperative rehabilitation and treatment. Recognizing that MTFs are required to fund these ancillary services, the Department of Defense promulgated new regulations under 10 U.S.C. § 1095 that allow MTFs to recoup these costs and deposit collected amounts into their local operations and maintenance accounts. These regulations direct MTFs to add these costs to their per diem rates when calculating the total costs of treatment.

In cases involving automobile insurance, affirmative claims personnel should contact their local MTFs to insure that these procedures are being followed, and that money collected for ancillary services is being deposited into the MTF's operations and maintenance account for automobile insurance recovery. Money recovered from automobile insurers for ancillary services should not be deposited into the MTF's operations and maintenance account for *health benefits* insurance recovery. Captain McNelis.

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The following opinion of the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility addresses sexual relationships between lawyers and clients. It is based largely on the ABA Model Rules of Professional Conduct which were the basis of the Army's *Rules of Professional Conduct for Lawyers.*[1] It provides guidance that will be followed in considering the propriety of conduct of Army lawyers under the qualifying authority of The Judge Advocate General and to nongovernment lawyers appearing before Army tribunals in accordance with the *Manual for Courts-Martial.*[2] Conduct addressed in this opinion also may violate provisions of the Uniform Code of Military Justice[3] and regulations.[4] Lieutenant Colonel Fegley.

[1] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (17 May 1992).

[2] *See generally* Professional Responsibility Notes, *Professional Responsibility Opinion Number 92-6,* ARMY LAW., July 1993, at 49.

[3] *See, e.g.,* UCMJ art. 133 (conduct unbecoming an officer and gentlemen) (1988); *Id.* art. 134 (adultery, fraternization, and conduct that is prejudicial to good order and discipline or that is service discrediting); *Id.* art. 92 (failure to obey order or regulation).

[4] *See, e.g.,* DEP'T OF ARMY, REG. 600-20, PERSONNEL—GENERAL: ARMY COMMAND POLICY, para. 6-4(b) (I02, 1 Apr. 1992) ("Any soldier or civilian employee . . . [w]ho makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment").

American Bar Association
Standing Committee on Ethics and Professional Responsibility
Formal Opinion 92-364*
Sexual Relations with Clients
July 6, 1992

A sexual relationship between lawyer and client may involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair a lawyer's ability to represent the client competently, and therefore may violate both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility.

The Committee has been asked whether a lawyer violates the ABA Model Rules of Professional Conduct (1983, amended 1991) or the ABA Model Code of Professional Responsibility (1969, amended 1980) by entering into a sexual relationship with a client during the course of representation.[1] In the opinion of the Committee, such a relationship may involve unfair exploitation of the lawyer's fiduciary position and presents a significant danger that the lawyer's ability to represent the client adequately may be impaired, and that as a consequence the lawyer may violate both the Model Rules and the Model Code. The roles of lover and lawyer are potentially conflicting ones as the emotional involvement that is fostered by a sexual relationship has the potential to undercut the objective detachment that is often demanded for adequate representation.

Although no detailed statistics are presently available to document the incidence of sexual relations between clients and their lawyers, there is information enough to substantiate both the existence and the seriousness of problems in this area.[2] Recent efforts in several states to draft rules addressing these problems have highlighted the need to clarify the ethical precepts that govern attorney conduct in this area.[3]

The Committee recognizes that no provision in either the Rules or the Code specifically addresses, let alone prohibits, sexual relationships between lawyer and client. However, there are several provisions of the Model Rules that may be implicated by a sexual relationship, particularly one that arises after the formation of the attorney-client relationship. First, because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that the sexual relationship will have resulted from exploitation of the lawyer's dominant position and influence and, thus, breached the lawyer's fiduciary obligations to the client. Second, a sexual relationship with a client may affect the independence of the lawyer's judgment. Third, the lawyer's engaging in a sexual relationship with a client may create a prohibited conflict between the interests of the lawyer and those of the client. Fourth, a non-professional, yet emotionally charged, relationship between attorney and client may result in confidences being imparted in circumstances where the attorney-client privilege is not available, yet would have been, absent the personal relationship.

The Lawyer Has Fiduciary Obligations to the Client that Require, *Inter Alia,* that the Lawyer not Take Advantage of His or Her Dominant Position or Exploit the Dependent and Vulnerable Position of the Client

It is axiomatic that the attorney-client relationship is a fiduciary one in which the client places his or her trust and confidence in the lawyer in return for the lawyer's undertaking to

*This opinion is based on the Model Rules of Professional Conduct, and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

[1] A sexual relationship predating the professional relationship could, in some circumstances, raise the same ethical problems as are here considered. Because the likelihood of this happening should be considerably less when the sexual relationship predates the professional one, this opinion focuses primarily on sexual relationships that develop after the formation of the professional relationship.

[2] The Illinois Attorney Registration and Disciplinary Commission received approximately 50 complaints about lawyer sexual misconduct in 1989 alone as reported in the 1990 Report of the Illinois Task Force on Gender Bias in the Courts at 54. The Commission called the problem a "systemic, unchanging and consistent trend" in the domestic relations field. In addition, anecdotal evidence illustrates the acute nature of the problem. *See* Jorgenson & Sutherland, *Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact,* 45 ARK. L. REV. 459 (1992); Dubin, *Sex and the Divorce Lawyer: Is the Client Off Limits?,* 3 GEO. J. LEG. ETHICS 585 (1988); Lyon, *Sexual Exploitation of Divorce Clients: The Lawyer's Prerogative,* 10 HARV. WOMEN'S L. J. 159 (1987); A. Stone, *Law, Psychiatry and Morality* 199 (1984).

[3] California, Illinois, and Oregon all have recently attempted to draft rules covering attorney-client sexual relations. *See, e.g.,* California Proposed Rule 3-120; Illinois Proposed Rule 1.17; Oregon Proposed Rule 107-139. *See also McDaniel v. Gile,* 281 Cal. Rptr. 242, 230 Cal. App. 3d 363 (1991); *Suppressed v. Suppressed,* 206 Ill. App. 3d 918, 565 N.E. 2d 101 (1990).

place the interest of the client ahead of any self-interest of the lawyer.[4] This fiduciary relationship imposes the highest standards of ethical conduct on the lawyer.

> A lawyer is bound to conduct himself as a fiduciary or trustee occupying the highest position of trust and confidence, so that, in all his relations with his client, it is his duty to exercise and maintain the utmost good faith, honesty, integrity, fairness and fidelity .... This fiduciary or trust relationship precludes the attorney from personal interests antagonistic to those of the client or from obtaining personal advantage or profit out of the relationship.

Hafter v. Farkas, 498 F.2d 587, 589 (2d Cir. 1974); *see also Singleton v. Foreman*, 435 F.2d 962, 970 (5th Cir. 1970). The lawyer's position of trust places the burden on the lawyer to ensure that all attorney-client dealings are fair and reasonable[5] and do not interfere with competent representation.[6]

The attorney-client relationship is not merely one that necessarily imposes fiduciary obligations but also one that is often inherently unequal. The client comes to a lawyer because he or she needs help to resolve a problem. The client puts his or her faith in the lawyer's ability to think reasonably and objectively for the client's benefit. The client relies on the lawyer's special knowledge, skills and access to the courts to solve the client's problem. The lawyer encourages this special relationship, offering to lead the client through a complex legal system.

The factors leading to the client's trust and reliance on the lawyer also have the potential for placing the lawyer in a position of dominance and the client in a position of vulnerability. All of the positive characteristics that the lawyer is encouraged to develop so that the client will be confident that he or she is being well served can reinforce a feeling of dependence. While there are situations, especially in the commercial business setting, in which the sophisticated corporate client representative has little or no sense of dependence, there is also a broad range of situations in which the client, by virtue of his or her emotional state, educational level, age or social status, feels particularly dependent and disarmed vis-a-vis the attorney.

The nature of the matter can also affect the degree of dependence. An individual client, in particular, is likely to have retained a lawyer at a time of crisis. The divorce client's marriage is disintegrating. The criminal client may have just been arrested and could be facing the possibility of jail. The probate client is dealing with the loss of a loved one. The immigration client may be in fear of deportation. Other clients may be trying to save a business or salvage a reputation. The corporate employee may see his or her employment on the line depending on the outcome of the transactions or litigation, viewing the lawyer as a potential savior of the employee's job.

The fiduciary obligation inherent in the lawyer's role is heightened if the client is emotionally vulnerable in a way that affects the client's ability to make reasoned judgements about the future. Model Rule 1.14(a) provides that

> [w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.[7]

Similarly, the ABA standards relating to disciplinary sanctions assert that any special vulnerability of the victim should be considered an aggravating circumstance when imposing attorney discipline. *See* ABA Standards for Imposing Lawyer Sanctions § 9.22(h) (1986, amended 1992).

Thus, the more vulnerable the client, the heavier the obligation of the lawyer to avoid engaging in any relationship other than that of attorney-client.[8] If the lawyer permits the otherwise benign and even recommended client reliance and trust to become the catalyst for a sexual relationship with a client,

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[4] This fiduciary relationship arises from principles of common law. As stated by the Supreme Court in 1850: "There are few business relations of life involving a higher trust and confidence than those of attorney and client, or generally speaking one more honorably and faithfully discharged, few more anxiously guarded by the law or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment of prejudice of the rights of the party bestowing it." *Stockton v. Ford*, 52 U.S. (11 How) 232, 247 (1850); *see also Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1283 (Pa. 1992) (citing *Stockton* with approval); *In re Education Law Center, Inc.*, 86 N.J. 124, 429 A.2d 1051 (1981) (same); 98 A.L.R. 2d 1235 (1964) (collecting cases).

[5] *See* Comment to Model Rule 1.8: "As a general principle, all transactions between client and lawyer should be fair and reasonable to the client."

[6] Model Rule 1.1 states that a lawyer shall provide competent representation to a client.

[7] There is no direct counterpart to this rule in the disciplinary rules of the Model Code. EC 7-12, however, states that any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibility upon the lawyer.

[8] Similar concerns about a lawyer's taking advantage of those who are emotionally vulnerable have led to a prohibition on the immediate solicitation of relatives of victims of mass accidents. Solicitation of clients is restricted until the relatives are less wracked with emotion and more capable of reasoned judgment. *See, e.g., In re Anis*, 599 A.2d 1265 (N.J. 1992) (imposing a two-week waiting period on attorneys before solicitation is allowed). Model Rule 7.3 (b).

the lawyer may violate one of the most basic ethical obligations, i.e., not to use the trust of the client to the client's disadvantage.[9] This obligation has deep historical roots:

> [A] most scrupulous fidelity must be forever observed on the part of the lawyer toward his client so that he shall never betray or take advantage [of the client] neither in word or deed . . . good policy would seem to require, as well as every principle of honour and fair dealing, that the counsel or attorney should not be permitted to do anything that would tend to prejudice the interest of his client or occasion a loss to him.[10]

The principle rests on public policy, and is "intended as a protection to the client against the strong influence to which the confidential relation naturally gives rise."[11] It was formalized in Canon 11 of the Canons of Professional Ethics, which provided that "the lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client." *See also* ABA Comm. on Professional Ethics, Informal Op. C-804 (1964) (lawyers are obligated to refrain from actions that would abuse the confidence and trust reposed in the lawyer by the client).

This fundamental principle of fiduciary obligation is recognized in both the Model Rules and the Model Code. Rule 1.8(b) and DR 4-101(B)(2) both provide that a lawyer may not use client confidences to the disadvantage of the client. Both Model Rule 1.7(b) and DR 5-101 prohibit a lawyer from representing a client when the representation may be limited by the lawyer's own interests.

These rules reflect the fundamental obligation of a lawyer not to exploit a client's trust for [illegible] same principle underlies the rul[illegible] lawyers not take financial advanta[illegible] transactions concurrent with the [illegible] are inherently suspect. Generally, [illegible] a financial transaction with a clie[illegible] action was fair, equitable and just [illegible] from undue influence. Thus, Ru[illegible] transactions unless full disclos[illegible] advised to seek the advice of inc[illegible]

client's written consent is obtained. Disciplinary Rule 5-104(a) and EC 5-3 of the Code impose similar requirements. These provisions safeguard clients from lawyers who abuse their ability to influence their client for their own financial gain. This protection is called for because the unequal nature of the lawyer-client relationship makes it particularly susceptible to abuse.

The same fundamental principle of fiduciary obligation that underlies the specific rules governing attorney-client financial dealings implies as well that a lawyer should not abuse the client's trust by taking sexual or emotional advantage of a client. Protecting a client's emotional and physical well-being is surely as important as protecting the client's financial well-being.[12] The inherently unequal attorney-client relationship allows the unethical lawyer just as easily to exploit the client sexually as financially. The trust and confidence reposed in a lawyer can provide an opportunity for the lawyer to manipulate a client emotionally for the lawyer's sexual benefit. Moreover, the client may not feel free to rebuff unwanted sexual advances because of fear that such a rejection will either reduce the lawyer's ardor for the client's cause or, worse yet, require finding a new lawyer, causing the client to lose the time and money that has already been invested in the present representation and possibly damaging the client's legal position.[13]

Such an abuse of client trust, even though not explicitly prohibited by any ethical rule, would nonetheless be inconsistent with the fiduciary obligation reflected in both the Model Rules and the Model Code. Moreover, such a sexual relationship, whether or not resulting from an abuse of trust, poses a [illegible] lationship.

[illegible]tionship that May [illegible]lations

[illegible]ip between lawyer and [illegible]attorney to provide the [illegible]ient that is ethically [illegible]different reasons.

MEMORANDUM OF CALL — Previous editions usable

TO:

☐ YOU WERE CALLED BY— ☐ YOU WERE VISITED BY—

OF (Organization)

☐ PLEASE PHONE ▶ ☐ FTS ☐ AUTOVON

☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

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RECEIVED BY | DATE | TIME

63-110 NSN 7540-00-634-4018 STANDARD FORM 63 (Rev. 8-81) Prescribed by GSA FPMR (41 CFR) 101—11.6

[9] *See, e.g.*, DR 7-101(a)(3) stating that a law[illegible]al relationship.

[10] *Galbraith v. Elder*, 8 Watts (Pa.) 81, 94 ([illegible]

[11] *Thomas v. Turner's Adm'r*, 87 Va. 1, 12 [illegible]alid; the presumption can be overcome only by clear evidence).

[12] *See, e.g., Hafter v. Farkas*, 498 F.2d 587 [illegible]res that the attorney treat his clients with civility, common decency and [illegible]

[13] The client might also fear that the lawyer [illegible]fidence. *See Kentucky State Bar Association v. Meredith*, 752 S.W.2d [illegible]aling privileged information about client after his discharge).

[14] *See* Rule 1.1 and DR 6-101 stating that a [illegible]g the integrity and improving the competency of the bar is the ethical resp[illegible] in representing clients").

1. A Sexual Relationship May Deprive the Lawyer of Independent Judgment.

Emotional detachment is essential to the lawyer's ability to render competent legal services. One of the most important aspects of the attorney-client relationship is the attorney's duty to exercise independent professional judgment.[15] Thus, Model Rule 2.1 states that when representing a client "a lawyer shall exercise independent professional judgment and render candid advice." *Id.* The lawyer must evaluate the client's situation, objectively and reasonably, fairly considering all possible courses of action.

It can be difficult, however, to separate sound judgment from the emotion or bias that may result from a sexual relationship. A lawyer involved in a sexual and emotional relationship with a client may encounter particular difficulty in providing the "straightforward advice" which "often involves unpleasant facts and alternatives that a client may be disinclined to confront." Rule 2.1 comment. Because of a desire to preserve the relationship, the lawyer may "be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." *Id.* Thus, a lawyer who engages in a sexual relationship with a client during the course of representation risks losing the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment.

2. A Sexual Relationship Creates Risks that the Lawyer Will Be Subject to a Conflict of Interest.

One of the hallmarks of the legal profession is the obligation of a lawyer to exercise professional judgment solely on behalf of the client. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1482 (1982). A sexual relationship between the parties may hinder the attorney's ability to meet this obligation. "It cannot be proper for a lawyer to represent a client when the lawyer's own interest may tempt him to temper his efforts to promote to the utmost his client's interest." ABA Comm. on Professional Ethics and Grievances, Formal Op. 132 (1935). Certainly the lawyer's interest in preserving the sexual relationship can rise to this level.

Rule 1.7(b) states that a lawyer shall not represent a client if the representation of the client may be materially limited by the lawyer's own interests. DR 5-101(A) similarly obligates the lawyer not to accept employment if the exercise of the lawyer's professional judgment on behalf of the client will be, or reasonably may be, affected by the lawyer's own personal interest. If the lawyer's interests in the relationship interfere with decisions that must be made for the client, the representation will have been impaired.

While it may be argued that such a conflict only arises in the special situations presented, for example, by divorce proceedings, the fact is that these conflicting interests can arise even in seemingly benign settings. For instance, although it is generally thought that the ethical concerns raised by a sexual relationship are not present in the commercial corporate setting, a sexual relationship with a corporate client's representative can be just as problematic as in other contexts.

In the corporate setting the lawyer's client is the corporation, not any individual employee. Model Rule 1.13(a). And even in less extreme situations than those contemplated by Rule 1.13, as a result of instructions from the client the lawyer may be obliged to follow the established corporate chain of command in fulfilling counsel's obligation to report to the entity client. A potential conflict of interest arises if the lawyer, engaging in a sexual relationship with a corporate client's representative, learns information which may redound to the detriment of the sexual partner, but which should be reported to a higher authority.

Lawyers recognize how difficult it is to deal with such a situation in a representation free from a sexual relationship. When the corporate employee shares information with the company's lawyer and asks the lawyer either not to pass it on or pass it on anonymously, the corporate lawyer is conflicted enough in reconciling the lawyer's duty to the corporate client with the trust the corporate employee has reposed. Such a conflict can only be compounded when a sexual relationship is also involved.

A related danger resulting from the blurring of relationships and one where the lover becomes a participant adverse to the client is presented in divorce cases where the attorney engaging in a sexual relationship with a client may risk becoming an adverse witness to the client on issues of adultery and child custody.[16]

3. A Sexual Relationship May Risk Unwarranted Expectations Regarding the Preservation of Confidences and Related Dangers.

A sexual relationship between the parties may also have the potential to blur the contours of the attorney-client relationship. Client confidences are protected by privilege only when they are imparted in the context of the attorney-client relationship. The courts will not protect confidences given as part of a personal relationship; except for that of husband and wife, there is no privilege for lovers.[17] A blurred line between any

[15] *See also* DR 5-107 (prohibiting situations that could adversely affect the exercise of the lawyer's independent judgment on behalf of the client).

[16] *See* Model Rule 3.7, which requires that a lawyer terminate representation if the attorney is likely to be called as a witness against his client. *See also* DR 5-102(B) (adding the requirement that the testimony be prejudicial).

[17] *See, e.g., In re Marriage of Kantar,* 581 N.E.2d 6, 14 (Ill. App. 1991); *In re Pump,* 120 Wis. 2d 422, 355 N.W.2d 248 (1984), *see also* C. Wolfram, *Modern Legal Ethics,* 252 (1986) ("Even if the confidential relationship of lawyer and client is indisputably formed, it does not follow that every communication between them will be privileged. Some communication may have nothing to do with the lawyer's legal services").

professional and personal relationship may make it difficult to predict to what extent client confidences will be protected. Expectations of confidences will be forced to rest on ever shifting sands.

Conclusion

It is apparent that a sexual relationship during the course of representation can seriously harm the client's interests. Therefore, the Committee concludes that because of the danger of impairment to the lawyer's representation associated with a sexual relationship between lawyer and client, the lawyer would be well advised to refrain from such a relationship. If such a sexual relationship occurs and the impairment is not avoided, the lawyer will have violated ethical obligations to the client.[18]

The client's consent to sexual relations alone will rarely be sufficient to eliminate this danger. In many cases, the client's ability to give meaningful consent is vitiated by the lawyer's potential undue influence and/or the emotional vulnerability of the client. The lawyer may, therefore, be called upon in a disciplinary or other proceeding to show that the client consented, that the consent was freely given based on full and reasonable disclosure of the risks involved, and that any ensuing sexual relationship did not in any way disadvantage the client in the representation; that is, the attorney's judgment remained independent, the representation proceeded free of conflicts, the privilege was not compromised and the other ethical obligations to the client were fulfilled.

[18] Some other professions, most notably the medical profession, that have considered this issue have found that in their fields the potential ethical problems associated with a client-professional sexual relationship warrant an absolute ban on such relationships. *See* Report of the Council on Ethical and Judicial Affairs as adopted by the American Medical Association House of Delegates on December 4, 1990 (finding all sexual relationships between doctor and patient to be potentially exploitative and detrimental to the physician's medical judgement and to the patient's trust); *see also* R. Gorlin, *Codes of Professional Responsibility,* 217, 226-228, 281 (2d ed. 1990) (prohibiting professional-client sexual relationship for social workers and mental health workers).

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

The Judge Advocate General's Continuing Legal Education (On-Site) Training

This note identifies the training sites, dates, subjects, and local action officers for The Judge Advocate General's Continuing Education (On-Site) Training Program for academic year 1994. The Judge Advocate General has directed that all judge advocates assigned to the United States Army Reserve (USAR), Judge Advocate General Service Organizations (JAGSO), or judge advocate sections of USAR troop program units (TPU) shall attend on-site training sessions conducted in their geographic areas.[1] Other judge advocates serving in the USAR, National Guard, or on active duty are strongly encouraged to attend local training sessions. The On-Site Training Program, which features instructors from The Judge Advocate General's School, has been approved for continuing legal education (CLE) credit in many states. Many on-site sessions also include instruction by judge advocates of other services and distinguished civilian attorneys.

Each host unit has designated a local action officer. They must coordinate with all Reserve Component units to which judge advocates are assigned and must invite active-duty judge advocates on nearby Army installations to attend on-site training. Action officers also must notify members of the Individual Ready Reserve (IRR) that on-site training will occur in their geographical areas.[2]

[1] *See* DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, paras. 10-10, 11-11 (15 Sept. 1989).

[2] Limited funding from APERCEN may be available for an individual ready reserve (IRR) member to attend on-site training in active duty for training (ADT) status. An IRR member should submit an application for ADT status eight to ten weeks before the scheduled on-site session to Commander, ARPERCEN, ATTN: DARP-OPS (LTC Carazza), 9700 Page Boulevard, St. Louis, MO 63132-5260. Members of the IRR also may attend on-site training for retirement point credits. *See generally* DEP'T OF ARMY, REG. 140-185, ARMY RESERVE: TRAINING AND RETIREMENT POINT CREDITS AND UNIT STRENGTH ACCOUNTING RECORDS (15 Sept. 1979).

Whenever possible, action officers are encouraged to provide legal specialist, noncommissioned officer (NCO), and court reporter training concurrently with on-site training. In the past, active duty and Reserve Component judge advocates and NCOs, as well as instructors from the Army legal clerk's school at Fort Jackson, South Carolina, have conducted enlisted training programs.

Questions concerning the On-Site Training Program should be directed to the appropriate local action officer. Any problem that an action officer or a unit commander cannot resolve should be directed to Captain David Parker, Chief, Unit Training and Liaison Office, Guard and Reserve Affairs Department, Office of The Judge Advocate General, Charlottesville, VA 22903-1781 (telephone (804) 972-6383).

The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
16-17 Oct 93	Minneapolis, MN 214th LSO Thunderbird Motor Hotel 2201 East 78th St. Bloomington, MN 55425	AC GO RC GO Contract Law Ad & Civ Law GRA Rep	 COL Cullen MAJ Melvin MAJ Hernicz LTC Hamilton	MAJ William D. Turkula 7290 Topview Road Eden Prairie, MN 55346 (612) 672-3600
23-24 Oct 93	Willow Grove, PA 79th ARCOM/153d LSO Willow Grove Naval Air Station Air Force Auditorium Willow Grove, PA 19090	AC GO RC GO Int'l Law Contract Law GRA Rep	 COL Lassart MAJ Winters MAJ Hughes LTC Menk	LTC Robert C. Gerhard 619 Curtis Rd. Glenside, PA 19038 (215) 885-6780
13-14 Nov 93	New York City, NY 77th ARCOM/14th LSO Fordham Law School New York, NY 10023	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 Cullen/Lassart/Sagsveen MAJ Block MAJ Tomanelli COL Schempf	LTC John Greene 437 73d Street Brooklyn, NY 11209 (212) 264-0650
20-21 Nov 93	Boston, MA 94th ARCOM/3d LSO Hanscom Air Force Base Bedford, MA 01731	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Masterson MAJ Drummond LTC Hamilton	MAJ Donald Lynde 94th ARCOM Bldg. 1607 Hanscom AF Base, MA 01731 (617) 377-2845
8-9 Jan 94	Long Beach, CA 78th LSO Long Beach Marriott Inn Long Beach, CA 90815	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	 COL Sagsveen LTC McFetridge MAJ Burrell Dr. Foley	MAJ John C. Tobin 10541 Calle Lee Suite 101 Los Alamitos, CA 90720 (714) 752-1455
21-23 Jan 94	San Antonio, TX 90th ARCOM TBD	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 COL Cullen MAJ Emswiler LTC Dorsey COL Schempf	CPT William Hintze HQ, 90th ARCOM 1920 Harry Wurzbach Hwy. San Antonio, TX 78209 (210) 221-5164
29-30 Jan 94	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205	AC GO RC GO Criminal Law Int'l. Law GRA Rep	 COL Cullen MAJ O'Hare LCDR Winthrop LTC Hamilton	MAJ Mark W. Reardon 6th LSO Bldg. 572 Fort Lawton, WA 98199 (206) 281-3002

26-27 Feb 94	Salt Lake City, UT 87th LSO Olympus Hotel 6000 Third St., West Salt Lake City, UT 84114	AC GO RC GO Criminal Law Contract Law GRA Rep	 COL Sagsveen MAJ Wilkins MAJ Killham CPT Parker	MAJ Roger Corman 87th LSO, Bldg. 100 Douglas AFRC Salt Lake City, UT 84113 (801) 833-2119
26-27 Feb 94	Denver, CO 87th LSO Edgar L. McWethy, Jr. USARC Bldg. 820 Fitzsimons Army Medical Ctr Aurora, CO 80045-7050	AC GO RC GO Criminal Law Contract Law GRA Rep	 COL Cullen MAJ Wilkins MAJ Killham Dr. Foley	LTC Dennis J. Wing Bldg. 820 McWethy USARC Fitzsimons AMC Aurora, CO 80045-7050 (303) 343-6774
5-6 Mar 94	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC 29208	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	 COL Sagsveen MAJ Hudson MAJ Jennings LTC Menk	MAJ Robert H. Uehling 209 South Springs Road Columbia, SC 29223 (803) 733-2878
12-13 Mar 94	Washington, D.C. 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, D.C. 20319	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Winn MAJ Diner CPT Parker	MAJ Merrill W. Clark 7402 Flemingwood Lane Springfield, VA 22153 (703) 756-2281
19-20 Mar 94	San Francisco, CA 6th LSO Sixth Army Conference Room Bldg. 35 Presidio of SF, CA 94129	AC GO RC GO Criminal Law Int'l Law GRA Rep	 Cullen/Lassart/Sagsveen MAJ Jacobson MAJ Warren COL Schempf	MAJ Robert Jesinger 20683 Greenleaf Drive Cupertino, CA 95014-8808 (408) 297-9172
9-10 Apr 94	Fort Wayne, IN Marriott Hotel 305 E. Washington Center Road Fort Wayne, IN 46825 (219) 484-0411	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Sagsveen MAJ DeMoss MAJ Warren LTC Menk	MAJ Byron N. Miller 200 Tyne Road Louisville, KY 40207 (502) 587-3400
23-24 Apr 94	Atlanta, GA 81st ARCOM TBD	AC GO RC GO Criminal Law Int'l Law GRA Rep	 COL Lassart MAJ Hayden LTC Crane COL Schempf	MAJ Carey Herrin 81st ARCOM 1514 E. Cleveland Avenue East Point, GA 30344 (404) 559-5484
7-8 May 94	Gulf Shores, AL 121st ARCOM/ALARNG Gulf State Park Resort Hotel Gulf Shores, AL 36547	AC GO RC GO Ad & Civ Law Int'l Law GRA Rep	 COL Sagsveen MAJ Peterson MAJ Warner LTC Menk	LTC Bryant A. Whitmire 903 City Federal Bldg. Brimingham, AL 35203 (205) 324-6631
13-15 May 94	New Orleans, LA 122nd ARCOM TBD	AC GO RC GO Int'l Law Criminal Law GRA Rep	 COL Lassart MAJ Johnson MAJ Hunter Dr. Foley	LTC George Simno Leroy Johnson Drive New Orleans, LA 70146 (504) 484-7655
21-22 May 94	Columbus, OH 83d ARCOM/9th LSO/ OH STARC TBD	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Cullen CPT Causey LTC Crane CPT Parker	CPT Robert Watson 9th LSO 765 Taylor Station Road Blacklick, OH 43004-9615 (616) 755-5434

Notes from the Field

Military-to-Military Attorney Activities in Europe and Africa

Introduction

The end of the Cold War has sparked the growth of military-to-military relations with nations that were either former adversaries or were neglected in the allocation of scarce Cold War priorities. The United States European Command (USEUCOM) has become quite active in participating in military-to-military exchanges with former Warsaw Pact and African nations and this participation has included exchanges between military attorneys. For example, USEUCOM hosted a Conference on Military Law in a Democratic Society held in late September 1992. Military legal advisors and officers representing nine former communist countries in east and central Europe participated in a week of instruction and tours of facilities to familiarize themselves with United States military law and procedures.

Attorney exchanges also have involved sending judge advocates to other nations for in-depth interactions on legal issues of common interest. A team headed by Colonel James Burger, Legal Advisor, USEUCOM, with team members Colonel Robert Reed, Deputy Judge Advocate, United States Air Force, Europe; Commander Frank Russo, Deputy Judge Advocate, Naval Forces, Europe; Colonel Ferdinand Clervi, Chief Circuit Judge, Fifth Judicial Circuit; and Major Michael Hoadley, Senior Defense Counsel, Mannheim Field Office, visited Hungary in February 1993. In addition to briefings with military lawyers, the team met with a Supreme Court Judge and members of the Budapest Civilian Bar Association. This note reports on the experiences of Major Jaynes's participation in the Frontline States' Military Lawyers Conference held in Zimbabwe in September 1992, and Major Olmsted's participation in a week of meetings held in Budapest, Hungary, during November 1992.

African Frontline States

The African Frontline States form a broad east-west line across Africa just north of South Africa. These states consist of Angola, Botswana, Mozambique, Namibia, Tanzania, Zambia, and Zimbabwe. Over the past thirty years, Africans in these states have supported each other in their struggles to achieve independence from white-colonial governments. They continue to cooperate to foster political and economic development in their region.

In 1990, the Frontline States' defense leaders authorized the formation of a Military Lawyers' Association, whose protocol includes the following objectives: promote implementation of the law of war among leaders and soldiers of the armed forces; facilitate the development of military justice; and encourage cooperation on legal training and regional legal issues of common interest. After the first Association conference in Tanzania, its members decided to have the 1992 conference in Harare, the capital of Zimbabwe. The Association's leadership also sought to augment the infusion of fresh perspectives to the conference by inviting outside "resource" personnel. The USEUCOM participated in the conference held September 6 to 13, 1992, by sending Major Jaynes. Other outside resource people were Lieutenant Commander Hinkley from the Navy Judge Advocate General's Corps, and Major Herfst from the Canadian Judge Advocate General Corps.

The conference began with the keynote address delivered by the Zimbabwe Assistant Minister of Defense, who expressed strong support for the conference objectives and encouraged open dialogue among the participants. The Zimbabwe Army's Chief of Staff, a Zimbabwe Supreme Court Justice, and many other military and civilian officials attended the opening session. The opening of the conference was reported in the local newspaper and in television news broadcasts.

Following the break after the keynote address, a member from each state described military justice procedures from arrest to arraignment. Discussions following these presentations pointed out the need for legislative reform of the judicial systems inherited from former colonial governments. A presentation in the afternoon by the Regional Director of the Red Cross sparked active discussion among all participants about training soldiers in, and enforcing principles of, the law of war.

The high visibility of the conference was underscored at the two receptions hosted during the week. On the first evening of the conference, the Minister of Defense hosted a reception that was attended by the Commander of the Zimbabwe National Army. Later in the week, the Chief of Staff for the Zimbabwe National Army presented mementos to conference participants. Remarks at both receptions by hosting dignitaries clarified that military leaders encourage the Association's role as a mechanism for implementing needed changes in military legal policies and procedures.

Several themes were addressed repeatedly throughout conference sessions, both in formal presentations and in comments from the participants. The following items encapsulate what appeared to be the key issues on the minds of African participants: challenges facing judge advocates who seek to give independent legal advice; unlawful command influence; credibility of judge advocates among commanders; whether civilian appellate courts that review court-martial results should have authority to review sentences; identifying an approach for on-site training in the law of war and military justice; and how best to provide soldiers with legally qualified defense counsel representation in courts-martial. In addition

to these items, presentations were followed by lively discussions about military effects on the environment and policies on acquired immune deficiency syndrome (AIDS) in the military.

Throughout the conference, the interactions between all conference participants were friendly, candid, and genuine. Everyone seemed to be interested in discussing problems openly and each participant seemed receptive to new ideas. All participants were just as interested in cultural contrasts between the various countries represented as they were about legal differences and similarities. The Association members displayed an attitude of openness and curiosity toward the United States and Canadian resource people. Input from the resource people to the conference was solicited on each issue discussed and was accorded the same weight as any other participant.

The Director of Legal Services for the Zimbabwe Defense Forces, Colonel Chiweshe, and his staff extended gracious hospitality to the non-African guests throughout the conference. The Zimbabweans genuinely were delighted that their United States and Canadian guests had come to visit their country. They proudly pointed out the signs of social and economic progress being made in their country and anxiously awaited their guests' responses to the various demonstrations of their land, people, and way of life.

Future exchange opportunities similar to this can be expected. The Judge Advocate General's Corps' support for such conferences certainly nets mutual professional benefits for the representatives of all countries and generates significant goodwill with the host nations.

Military-to-Military Contact Team—Hungary

As part of the Joint Chiefs of Staff Joint Contact Team Program, United States Army, Europe, and 7th Army (USAREUR & 7th Army) served as the lead agency for several military contact teams that travelled to Budapest, Hungary, between October 1992 and March 1993. The teams were designed to provide topical information briefings to members of the General Staff of the Hungarian Home Defense Force (HHDF).

As an attorney assigned to the Office of the Judge Advocate, USAREUR and 7th Army, Major Olmsted served as part of the personnel management contact team visit. The team's mission was to present briefings and participate in informal discussions on United States Army personnel programs and military justice.

Prior to the visit to Hungary, the team received two days of training at the Institute for Russian Studies in Garmisch, Federal Republic of Germany. This training proved helpful in team building and gave the team an excellent background in Hungarian history, economics, military organization, and a variety of other topics.

Major Olmsted presented a four-hour briefing to approximately fifteen key officers and civilians from the HHDF headquarters and the Ministry of Defense. The briefing provided an overview of military justice with an emphasis on the constitutional protections extended to military personnel. In particular, Major Olmsted discussed civilian oversight, adherence to the rule of law, and loyalty to the Constitution rather than any person or group.

During animated discussions, the Hungarians asked many questions relating to rights afforded all soldiers and how the legal and constitutional protections were codified. Specifically, they expressed amazement that the United States Army expected its commanders to abide by restrictions under the Fourth and Fifth Amendment protections and Article 31 of the Uniform Code of Military Justice. A large portion of one hour was spent discussing restrictions on the ability of commanders to confine and punish soldiers. The tenor of the questions illustrated that HHDF commanders had few restrictions in the types and duration of punishments that they could impose. The audience displayed some skepticism on how its commanders would react to limitations on what they viewed as necessary command authority.

Many questions stemmed from ongoing work by members of the audience on applying Hungary's newly amended constitution and laws to the military. As a result of requests by HHDF personnel, materials that implement United States military justice were provided, including the *Manual for Courts-Martial*, portions of *Army Regulation 27-10, Legal Services: Military Justice,* and a USAREUR Commander's Guide. Some of the informal discussions involved philosophy of the purpose of military justice and its effect on discipline and morale. The individuals involved in the effort to develop a military justice system were wide-ranging thinkers with an appreciation for individual rights and the rule of law.

The Hungarians displayed an openness and sincerity during the formal and informal talks that fostered an ideal environment in which to exchange ideas and information. The high level of participants in both the briefings and during the formal social functions illustrated the importance the Hungarians placed on this visit. The Commander of the Ground Defense Forces, Major General Laszlo Makai, personally hosted one day-long briefing at the Headquarters, Ground Defense Forces about eighty kilometers south of Budapest. A formal dinner was hosted by Major General Jossef Biro, the First Deputy of the Home Defense Staff. Major General Biro had visited USAREUR Headquarters and talked at length about the importance of the military-to-military contact for both nations.

The Hungarian people were gracious hosts and, despite differences in military traditions and systems, members of the HHDF apparently view the United States military as friends with a great deal to offer. Such military-to-military contacts provide unique opportunities for judge advocates to participate in rewarding programs that develop professional and social relationships with personnel from other armed forces. Major Jaynes and Major Olmsted.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1993

8-10 September: USAREUR Legal Assistance CLE (5F-F23E).

13-17 September: USAREUR Administrative Law CLE (5F-F24E).

20-24 September: 10th Contract Claims, Litigation, and Remedies Course (5F-F13).

4-8 October: 1993 JAG Annual Continuing Legal Education Workshop (5F-JAG).

14-15 October: Appellate Judges Conference.

18-22 October: USAREUR Criminal Law CLE (5F-F35E).

18 October-22 December: 132d Basic Course (5-27-C20).

18-22 October: 33d Legal Assistance Course (5F-F23).

25-29 October: 120th Senior Officers' Legal Orientation Course (5F-F1).

25-29 October: 55th Law of War Workshop (5F-F42).

1-5 November: 31st Criminal Trial Advocacy Course (5F-F32).

15-19 November: 37th Fiscal Law Course (5F-F12).

29 November-3 December: 17th Operational Law Seminar (5F-F47).

2-3 December: 2d Procurement Fraud Orientation (5F-F37).

6-10 December: USAREUR Operational Law CLE (5F-F47E).

6-10 December: 121st Senior Officers' Legal Orientation Course (5F-F1).

1994

3-7 January: 44th Federal Labor Relations Course (5F-F22).

10-13 January: USAREUR Tax CLE (5F-F28E).

10-14 January: 1994 Government Contract Law Symposium (5F-F11).

18 January-25 March: 133d Basic Course (5-27-C20).

24-28 January: PACOM Tax CLE (5F-F28P).

31 January-4 February: 32d Criminal Trial Advocacy Course (5F-F32).

7-11 February: 122d Senior Officers' Legal Orientation Course (5F-F1).

22 February-4 March: 132d Contract Attorneys' Course (5F-F10).

7-11 March: USAREUR Fiscal Law CLE (5F-F12E).

7-11 March: 34th Legal Assistance Course (5F-F23).

21-25 March: 18th Administrative Law for Military Installations Course (5F-F24).

28 March-1 April: 7th Government Materiel Acquisition Course (5F-F17).

4-8 April: 18th Operational Law Seminar (5F-F47).

11-15 April: 123d Senior Officers' Legal Orientation Course (5F-F1).

11-15 April: 56th Law of War Workshop (5F-F42).

18-21 April: 1994 Reserve Component Judge Advocate Workshop (5F-F56).

25-29 April: 5th Law for Legal NCOs Course (512-71D/E/20/30).

2-6 May: 38th Fiscal Law Course (5F-F12).

16-20 May: 39th Fiscal Law Course (5F-F12).

16 May-3 June: 37th Military Judges' Course (5F-F33).

23-27 May: 45th Federal Labor Relations Course (5F-F22).

6-10 June: 124th Senior Offices' Legal Orientation Course (5F-F1).

13-17 June: 24th Staff Judge Advocate Course (5F-F52).

20 June-1 July: JAOAC (Phase II) (5F-F58).

20 June-1 July: JATT Team Training (5F-F57).

6-8 July: Professional Recruiting Training Seminar.

11-15 July: 5th Legal Administrators' Course (7A-550A1).

11-15 July: 6th STARC Judge Advocate Mobilization and Training Workshop.

13-15 July: 25th Methods of Instruction Course (5F-F70).

18-29 July: 133d Contract Attorneys' Course (5F-F10).

18 July-23 September: 134th Basic Course (5-27-C20).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

8-12 August: 18th Criminal Law New Developments Course (5F-F35).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 11th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian-Sponsored CLE Courses

November 1993

1, GWU: Suspension and Debarment, Washington, D.C.

1-5, ESI: Operating Practices in Contract Administration, San Diego, CA.

1-5, GWU: Cost-Reimbursement Contracting, Washington, D.C.

2-4, ESI: Strategic Purchasing, Washington, D.C.

2-5, ESI: The Winning Proposal, Washington, D.C.

3-5, ESI: International Project Management, Washington, D.C.

7-11, NCDA: Child Abuse & Exploitation, San Francisco, CA.

8-9, ESI: Contract Performance Measurement: A Key to Problem Prevention, San Diego, CA.

8-10, GWU: Patents, Technical Data & Computer Software, Washington, D.C.

14-18, NCDA: Government Civil Practice, San Diego, CA.

15, ESI: Contract Accounting Systems for Small Business, Washington, D.C.

15-16, GWU: International Government Procurement, Washington, D.C.

15-19, ESI: Accounting for Costs on Government Contracts, Washington, D.C.

16-19, ESI: Competitive Proposals Contracting, San Diego, CA.

16-19, ESI: Contracting for Services, Denver, CO.

16-19, ESI: Negotiation Strategies and Techniques, Washington, D.C.

30-3 December 1993, ESI: Procurement for Administrators, CORs, and COTRs, Washington, D.C.

30-3 December 1993, GWU: Source Selection Workshop, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1993 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	20 January biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1993 issue of *The Army Lawyer*.

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

*AD A265755 Government Contract Law Deskbook Vol 1 /JA-501-1-93 (499 pgs).

*AD A265756 Government Contract Law Deskbook, Vol 2/ JA-501-2-93 (481 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act/JA-260(92) (156 pgs).

AD A266177 Legal Assistance Wills Guide/JA-262-91 (474 pgs).

AD A244032 Family Law Guide/JA 263-91 (711 pgs).

AD A241652 Office Administration Guide/JA 271-91 (222 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).

AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).

AD A259022 Tax Information Series/JA 269(93) (117 pgs).

AD A256322 Legal Assistance: Deployment Guide/JA-272(92) (364 pgs).

AD A260219 Air Force All States Income Tax Guide—January 1993.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).

AD A255038 Defensive Federal Litigation/JA-200(92) (840 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A255064 Government Information Practices/JA-235 (92) (326 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A256772 The Law of Federal Employment/JA-210(92) (402 pgs).

AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).

AD A260913 Unauthorized Absences/JA 301(92) (86 pgs).

AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).

AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).

AD A251821 Trial Counsel and Defense Counsel Handbook/ JA 310(92) (452 pgs).

AD A261247 United States Attorney Prosecutions/JA-338(92) (343 pgs).

International Law

AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *Obtaining* Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program,* paragraph 12-7c (28 February 1989) is provided to assist Active, Reserve, and National Guard units.

> The units below are authorized publications accounts with the USAPDC.
>
> (*1*) *Active Army.*
>
> (*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)
>
> (*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.
>
> (*2*) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> Units not described in [the paragraphs] above also may be authorized accounts. To

establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of *DA Pam. 25-33,* you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

b. *Listed below are new publications and changes to existing publications.*

Number	Title	Date
AR 5-14	Management of Contracted Advisory and Assistance Services	15 Jan 93
AR 30-18	Army Troop Issue Subsistence Activity Operating Policies	4 Jan 93
AR 135-156	Military Publications Personnel Management of General Officers, Interim Change 101	1 Feb 93
CIR 11-92-3	Internal Control Review Checklist	31 Oct 92
CIR 608-93-1	The Army Family Action Plan X	15 Jan 93
JFTR	Joint Federal Travel Regulations, Change 75	1 Mar 93
UPDATE 16	Enlisted Ranks Personnel Update Handbook, Change 3	27 Nov 93

3. LAAWS Bulletin Board Service

a. The Legal Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) dedicated to serving the Army legal community and certain approved DOD agencies. The LAAWS BBS is the successor to the OTJAG BBS formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

1) Active duty Army judge advocates;

2) Civilian attorneys employed by the Department of the Army;

3) Army Reserve and Army National Guard judge advocates on active duty, or employed full time by the federal government;

4) Active duty Army legal administrators, noncommissioned officers, and court reporters;

5) Civilian legal support staff employed by the Judge Advocate General's Corps, U.S. Army;

6) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, HQS); and

7) Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to the following address:

LAAWS Project Officer
Attn: LAAWS BBS SYSOPS
Mail Stop 385, Bldg. 257
Fort Belvoir, VA 22060-5385

b. Effective 2 November 1992, the LAAWS BBS system was activated at its new location, the LAAWS Project Office at Fort Belvoir, Virginia. In addition to this physical transition, the system has undergone a number of hardware and software upgrades. The system now runs on a 80486 tower, and all lines are capable of operating at speeds up to 9600 baud. While these changes will be transparent to the majority of users, they will increase the efficiency of the BBS, and provide faster access to those with high-speed modems.

c. Numerous TJAGSA publications are available on the LAAWS BBS. Users can sign on by dialing commercial (703) 805-3988, or DSN 655-3988 with the following telecommunications configuration: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask a new user to answer several questions and tell him or her that access will be granted to the

LAAWS BBS after receiving membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on to the LAAWS BBS using ENABLE and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it on to your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when ask to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip"

signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review Article.
505-1.ZIP	June 1992	Volume 1 of the May 1992 Contract Attorneys Course Deskbook.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys Course Deskbook.
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, Nov. 1991.
93CLASS.ASC	July 1992	FY TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY TJAGSA Course Schedule; ASCII.
93CRS.EN	July 1992	FY TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	*The Army Lawyer/ Military Law Review* Database (Enable 2.15). Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
CCLR.ZIP	September 1990	Contract Claims, Litigation, Litigation & Remedies.
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook.
FSO_201.ZIP	October 1992	Update of FSO Automation Program.
JA200A.ZIP	August 1992	Defensive Federal Litigation, Part A, Aug. 92.
JA200B.ZIP	August 1992	Defensive Federal Litigation, Part B, Aug. 92.
JA210.ZIP	October 1992	Law of Federal Employment, Oct. 92.
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations, July 92.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA235-92.ZIP	August 1992	Government Information Practices, July 92. Updates JA235.ZIP.
JA235.ZIP	March 1992	Government Information Practices.
JA241.ZIP	March 1992	Federal Tort Claims Act.
JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Update, Sept. 92.
JA261.ZIP	March 1992	Legal Assistance Real Property Guide.
JA262.ZIP	March 1992	Legal Assistance Wills Guide.
JA267.ZIP	March 1992	Legal Assistance Office Directory.
JA268.ZIP	March 1992	Legal Assistance Notarial Guide.
JA269.ZIP	March 1992	Federal Tax Information Series.
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide.
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.

FILE NAME	UPLOADED	DESCRIPTION
JA275.ZIP	March 1992	Model Tax Assistance Program.
JA276.ZIP	March 1992	Preventive Law Series.
JA281.ZIP	March 1992	AR 15-6 Investigations.
JA285.ZIP	March 1992	Senior Officers' Legal Orientation.
JA285A.ZIP	March 1992	Senior Officers' Legal Orientation Part 1 of 2.
JA285B.ZIP	March 1992	Senior Officers' Legal Orientation Part 2 of 2.
JA290.ZIP	March 1992	SJA Office Managers' Handbook.
JA301.ZIP	July 1991	Unauthorized Absence—Programmed Text, July 92.
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, July 1992.
JA320.ZIP	July 1992	Senior Officers' Legal Orientation Criminal Law Text, May 92.
JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Text, Mar. 92.
JA337.ZIP	July 1992	Crimes and Defenses Deskbook, July 92.
JA4221.ZIP	May 1992	Operational Law Handbook, Disk 1 of 2.
JA4222.ZIP	May 1992	Operational Law Handbook, Disk 2 of 2.
JA509.ZIP	Oct 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, & Remedies Course held Sept. 92.
JAGSCHL.ZIP	Mar 1992	JAG School Report to DSAT.
ND-BBS.ZIP	July 1992	TJAGSA Criminal Law New Developments Course Deskbook. Aug. 92.
V1YIR91.ZIP	January 1992	Section 1 of the TJAGSA's Annual Year in Review for CY 1991 as presented at the Jan. 92 Contract Law Symposium.
V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991.
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991.
YIR89.ZIP	January 1990	Contract Law Year in Review—1989.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement which verifies that he or she needs the requested publications for purposes related to his or her military practice of law.

g. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, Sergeant First Class Tim Nugent, commercial (703) 805-2922, DSN 655-2922, or at the address in paragraph a, above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will

continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 274-7115, ext. 394, commercial (804) 972-6394, or facsimile (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

Mr. Al Hall, South Atlantic Division, Corps of Engineers, Room 313, 7 Forsythe Street, S.W., Atlanta, GA 30303, (404) 331-2096, has one set each of the following:

- 1950-1989 NLRB Decisions (CCH), 46 vols.
- Labor Law Reporter (CCH), 20 vols.
- Labor Cases (CCH) 1946-1990, 98 vols.
- Employment Practices Decisions (CCH), 54 vols.
- General Statutes of North Carolina, 26 vols.
- Code of Laws of South Carolina, 44 vols.
- Tennessee Code Annotated, 30 vols.
- Florida Statutes Annotated (West), 78 vols.
- Code of Alabama, 35 vols.
- Mississippi Code Annotated, 27 vols.
- Georgia Cases—South Eastern Digest, 34 vols.
- Southern Digest, 107 vols.
- South Eastern Digest, 30 vols.
- Corpus Juris Secundum, 165 vols.
- Federal Digest, 103 vols.
- Words & Phrases, 90 vols.
- Modern Federal Practice Digest, 96 vols.
- Federal Practice Digest, 105 vols.
- ALR lst, 175 vols.
- ALR 2nd, 100 vols.
- ALR Digest, 12 vols.
- ALR 2nd Digest, 7 vols.

Jama Hall, Library Accountability Officer, Headquarters, Training Center Command, Fort Jackson, South Carolina 29207-6600, (803) 751-7844, has the following materials:

- American Jurisprudence 2d, vol. 68 (Sales and Use Taxes to Searches Seizures)
- Military Justice Reporter, vol. 35
- South Eastern Reporter, vol. 408

c. Library Administrators. The Army Law Library Service (ALLS) seeks to use electronic mail (e-mail) more effectively for its reports and correspondence. The Army Law Library Service asks library administrators to send their current defense data network (DDN) addresses to Mrs. Helena Daidone, DDN address: daidone@jags2.jag.virginia.edu. E-mail responses are encouraged.

6. Erratum.

Effective Installation Compliance with the Endangered Species Act, an article published in the June 1993 issue of *The Army Lawyer* stated incorrectly that, "*By serving the notice,* the Defenders of Wildlife have avoided the standing problem that led to the reversal in *Lujan v. Defenders of Wildlife* . . . ." *See* Major Craig E. Teller, *Effective Installation Compliance with the Endangered Species Act,* Army Law., June 1992, note 40 (emphasis added). Introduced in the editorial revision of the article, this error in no way reflects Major Teller's interpretaion of the case law. The passage should have read, "The notice indicates that Defenders of Wildlife now has membership that will avoid the standing problem that led to the reversal in *Lujan v. Defenders of Wildlife* . . . ."

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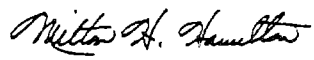

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